IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner,

v.

W.J. ESTELLE JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The en banc opinion of the court of appeals (A. 25)[1] is reported at 587 F.2d 651. The panel opinion of the

[1] Throughout this Brief, references to the record on appeal will be made as follows: "(R. ____)." References to the separately bound Appendix will be made as follows: "(A. ____)." References to the separately bound charts submitted with this Brief, which contain only data of which this Court can take judicial notice, will be made as follows: "(C. ____)."

court of appeals (A. 9) is reported at 568 F.2d 1193. The opinon of the district court (A. 4) is not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 20, 1978 (A. 56). A petition for rehearing was denied on March 9, 1979 (A. 55). A petition for a writ of certiorari was filed on March 19, 1979, with in 90 days of both dates, and was granted on May 21, 1979 (A. 57). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Texas habitual offender statute, which mandates a life sentence upon conviction of a felony with two prior felony convictons, constitutes cruel and unusual punishment when applied to Rummel's conviction for theft by false pretext of $120.75, with prior convictions for presenting a credit card with intent to defraud of property worth approximately $80.00 and passing a forged check with a face amount of $28.36.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

Article 12.42(d) of the Texas Penal Code of 1974 provides:

> If it be shown on the trial of any felony offense that the defendant has previously been finally convicted of two felony offenses, and the second previous felony conviction is for an offense that occurred subsequent to the first previous conviction having become final, on conviction he shall be punished by confinement in the Texas Department of Corrections for life.

Article 63 of the Texas Penal Code of 1925, the predecessor statute to article 12.42(d), provides:

> Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Article 979 of the Texas Penal Code of 1925 provides:

> He is guilty of forgery who without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever.

Article 996 of the Texas Penal Code of 1925 provides:

> If any person shall knowingly pass as true, or attempt to pass as true, any such forged instru-

ment in writing as is mentioned and defined in the preceding articles of this chapter, he shall be confined in the penitentiary not less than two nor more than five years.

Article 1410 of the Texas Penal Code of 1925 provides:

> "Theft" is the fraudulent taking of corporeal personal property belonging to another from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

Article 1413 of the Texas Penal Code of 1925 provides:

> The taking must be wrongful, so that if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking, though originally lawful, was obtained by any false pretext, or with any intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of theft is complete.

Article 1555b, section 1 of the Texas Penal Code of 1925 provides:

> It shall be unlawful for any person to present a credit card or alleged credit card, with the intent to defraud, to obtain or attempt to obtain any item of value or service of any type; or to present

> such credit card or alleged credit card, with the intent to defraud, to pay for items of value or services rendered.

STATEMENT OF THE CASE

The background proceedings, as stated in the Fifth Circuit panel opinion and quoted in the en banc opinion, are as follows:

> In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining $120.75 under false pretenses [(R. 79-80) in violation of articles 1410 and 1413 of the Texas Penal Code of 1925].[2] The indictment also

[2] On August 15, 1972, the complaining witness, David Lee Shaw, gave Rummel a check for $120.75 in return for Rummel's promise to repair or replace a defective air conditioning compressor (R. 140-43, 158, 163-66, 176-78; *see* R. 152, 171, 206, 249-50). Although Rummel apparently attempted unsuccessfully to both purchase a new compressor (R. 146, 154, 169, 175) and retrieve the air conditioner (R. 171-73), he never performed the repairs (R. 146, 150-51, 168-69) after cashing the check (see R. 180-81, 191). The jury was asked to determine whether Rummel had intended to repair the air conditioner when he accepted Shaw's check (R. 107-09).

Rummel's attorney attempted unsuccessfully (R. 214-15; *see* R. 132-34) to introduce a signed and notarized statement indicating that Shaw had agreed to release Rummel from any claims concerning the $120.75 check and that Shaw "ha[d] no knowledge of any facts upon which any criminal prosecution could be based" (R. 214-16, 280). Shaw testified that a few days before trial, Rummel's parents had contacted Shaw and paid him $50.00 in return for Shaw's agreement to drop charges (R. 158-59).

charged him with having two prior felony convictions [(R.81)]: In 1964 he presented a credit card with the intent to defraud of approximately $), and in 1969 he passed a forged instrument with a face value of $28.36. [A] jury found him guilty as charged [of the false pretenses offense (R. 113, 281)]. After the state proved his two prior convictions [(R. 226-37, 255-78)], Rummel received an enhanced sentence of life imprisonment [(R. 244, 288)] under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925). On appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Rummel* v. *State,* 509 S.W.2d 630 (Tex. Crim. App. 1974). Rummel applied for postconviction relief and raised in the Texas courts the [issue presented here and an ineffective counsel claim (R. 36-40)], but his application was denied [by both the district court (R. 51-54) and the Texas Court of Criminal Appeals (R. 31)] without a hearing [(R. 53)]. Then Rummel sought habeas corpus relief [on the same grounds] in the federal district court [(R. 3-9)], which also denied his petition [(A. 4-6; R. 328-31)] without a hearing [(A.6; R. 331)].

Rummel v. *Estelle,* 568 F.2d 1193, 1195 (5th Cir.1978) (panel opinion) (A. 10), *quoted in Rummel* v. *Estelle,* 587 F.2d 651, 653 (5th Cir. 1978) (en banc) (A. 26). By a 2-1 vote, a Fifth Ciruit panel reversed the district court decision and held that article 63's automatic life sentence was cruel and unusual as applied to the offenses for which the sentence had been assessed. 568 F.2d 1193 (A. 9) (hereinafter referred to as "the panel opinion").

By an 8-6 vote, the Fifth Circuit sitting en banc vacated the panel opinion, affirmed the district court's denial of the petition on the Eighth Amendment issue, and remanded the case to the panel for reconsideration of the Sixth Amendment issue.[3] 587 F.2d 651 (A. 25) (hereinafter referred to as "the en banc opinion"). The en banc court held, in short, that while a severe sentence imposed for a minor offense could be cruel and unusual solely because of its length, 587 F.2d at 655 (A. 30), Rummel's automatic life sentence does not violate the Eighth Amendment because Rummel failed to prove that the legislative scheme has no rational basis and is totally and utterly rejected in modern thought, *id.* at 655-56, 661-62 (A. 30-31, 40-41). The en banc court reasoned as follows: (1) under Texas' good time credit system, Rummel becomes eligible for parole in twenty years, or in twelve years if he behaves while in prison, *id.* at 657-59 (A. 33-35); (2) the nature of the three offenses triggering Rummel's mandatory life sentence under article 63 is irrelevant, because the purpose of article 63 is to punish all three-time felons, irrespective of the nature of their underlying offenses, *id.* at 659 (A. 36); (3) Rummel might have received a comparable sentence in

[3] On remand, the panel reversed the district court decision on the Sixth Amendment issue and remanded the case to the district court for an evidentiary hearing on that issue. *Rummel* v. *Estelle,* 590 F.2d 103 (5th Cir. 1979). No hearing has yet been held. The second panel decision raises no issues presented to the Court in the Petition for Certiorari or in this Brief.

several other jurisdictions, *id.* at 659-60 (A. 37-38); (4) Rummel's punishment cannot appropriately be compared to the penalty for any single offense in Texas, *id.* at 660 (A. 38-39); and (5) the test of "whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted," *id.* at 660-61 (A. 39) (emphasis in original) (quoting the panel opinion, 568 F.2d at 1198 (A. 16)), has no role in Eighth Amendment analysis.

SUMMARY OF ARGUMENT

A. Application of the Eighth Amendment to Lengthy Sentences

In *Weems* v. *United States,* 217 U.S. 349 (1910), the Court held cruel and unusual a fine and 12-year sentence at *cadena temporal* (hard labor with chains) for falsifying a public record. While the decision rested in part on the inherent cruelty of *cadena temporal,* it also relied separately on the principle that the Eighth Amendment requires sentence length to be proportioned to the offense. Although *Weems* is the only case in which the Court has ever invalidated as cruel and unusual an excessively long prison term, frequent references to *Weems* in recent cases attest to the continuing vitality of the *Weems* principle as a limit on sentence length for relatively minor offenses.

B. The *Coker* Excessiveness Tests

Recently, the Court in *Coker* v. *Georgia,* 433 U.S. 58 (1977), indicated that a punishment exceeds the limits

of the Eighth Amendment if it "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain or suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592. Holding capital punishment for rape invalid on the second ground, the Court focused on three indices of disproportionality: (1) the nature of the offense, (2) the punishment for the same crime in other jurisdictions, and (3) the penalty for comparable offenses in the same jurisdiction.

1. Disproportionality

Rummel's punishment easily qualifies as excessive under all three criteria employed in the *Coker* Court's application of the "gross disproportionality" test.

a. Nature of the Offenses

First, Rummel's three offenses—forging a check with a face amount of $28.36, using another person's credit card to purchase approximately $80.00 in merchandise, and taking a check for $120.75 in return for a false promise to repair an air conditioner—lack the elements of violence, threat of harm, skill in crime, or moral depravity necessary to justify a life sentence.

The en banc court could justify its result only by first exaggerating the seriousness of Rummel's offenses and then trivializing the length of his life sentence. First, the court refused to consider the nature of Rummel's offenses and focused solely on the number of

Rummel's offenses as they reflect his supposed inability to conform to societal norms. In this manner the court precluded all challenges to sentences for repeat offenders, no matter how trivial the offenses.

Second, the en banc court treated Rummel's punishment as equivalent to a 12-year sentence because he could become eligible for parole consideration at the end of that period by obtaining the maximum good time credit during his term. Such logic overlooks several factors. First, Texas officials grant parole sparingly. Second, the possibility of parole creates no due process right to release, only "a mere hope." Reliance on bare possibilities deprives Rummel of his only opportunity for judicial review of his sentence and delegates the judiciary's responsibility for the Eighth Amendment proportionality inquiry to parole authorities, who rely on criteria unrelated to the nature of the offenses. Third, "bad" but not illegal behavior in prison, which is punishable by a loss of good time credit and a reduction in parole probabilities, surely would not justify an otherwise indefensibly excessive sentence. Finally, lifetime parole is not complete freedom; it is accompanied by lifetime supervision and the threat of reincarceration for even minor, noncriminal parole violations.

b. Punishment for the Same Offenses in Other Jurisdictions

Measured by the second criterion highlighted in *Coker*—punishment for the same offense in other jurisdictions—Rummel's sentence stands out as even more grossly excessive. Except for one state whose highest court has indicated serious Eighth Amendment reservations about application of a recidivist law to petty offenders, the law in no other American jurisdiction mandates a life sentence upon conviction of any three felonies. While statutes in three other states impose a life sentence after a fourth felony conviction, every other state law requires commission of at least one violent crime, imposes a sentence less than life, or grants sentencing discretion. Moreover, the Texas law, first enacted in 1856, once shared company with mandatory life sentence statutes in other states but now stands alone in the face of a marked national trend toward lighter and discretionary sentences and a violent crime limitation.

c. Punishments for Similar Offenses in Texas

The final *Coker* proportionality criterion—the penalty for similar offenses in the forum jurisdiction—underscores the severity of Rummel's sentence. Except for capital murder, Texas law does not impose a life sentence on even the most violent or depraved single or two-time offender. Moreover, Rummel's third offense became a misdemeanor eight months after his trial, carrying a maximum sentence of only one year.

2. No Measurable Contribution to Acceptable Penal Goals

Although the Court has never defined the contours of the *Coker* "no measurable contribution" test, Rummel's sentence probably qualifies since the enhanced punishment mandated by the Texas recidivist statute contributes almost nothing to the four recognized legitimate penological objectives: isolation, deterrence, rehabilitation, and retribution.

First, isolation of a repeat offender is an acceptable objective only to the degree that the offender endangers the public safety or welfare. But the true threat to the social order—the professional, dangerous criminal—often escapes detection or conviction and receives a long sentence upon first conviction. Meanwhile, most petty thieves, who are a nuisance but not a threat, have lost their propensity for criminal conduct by the time they are apprehended and convicted as habitual offenders.

Second, deterrence is a realistic expectation only when the punishment is proportioned to the gravity of the crime. And dangerous criminals anticipate heavy sentences upon apprehension, irrespective of enhancement statutes.

Third, long-term imprisonment, even if ultimately combined with permanent parole, does not rehabilitate. Instead, it psychologically destroys the recipient of the punishment.

Finally, retribution is a legitimate penal objective, if ever, only when the punishment fits the crime.

Indiscriminately harsh enhancement statutes such as the Texas law advance no coherent policies because judges sympathetic to the accused's plight encumber such statutes with restrictive prerequisites, prosecutors plea bargain based on criteria unrelated to any penal purpose, and juries, when given the opportunity, refuse to convict if the sentence is disproportionately severe.

3. Mandatory Nature of the Texas Law

If a judge or jury had independently assessed Rummel's life sentence, his objections would lose their force. Rummel's jury had no opportunity to nullify the prosecutor's case or consider mitigating circumstances, however, because Texas law prohibits informing the jury about the punishment automatically assessed a third offender once the factfinder determines that the defendant had been convicted of the two previous felonies alleged in the indictment.

4. Subjectivity

The en banc court objected to Rummel's analysis as subjective and predicted a flood of litigation. Although application of the Eighth Amendment, as with many constitutional rights, is inherently subjective, the proportionality principle is sufficiently important to sacrifice some objectivity. Moreover, the three cri-

teria used in *Coker* minimize subjectivity. Lower state courts have employed similar tests for years without being deluged by litigation. And the difficulty of developing objective measures argues for renewed effort to fashion such criteria, not for surrender.

C. Rational Basis

The rational basis test interjected by the en banc court is useless as a measure of punishment excessiveness since even torture has some rational basis as retribution or deterrent. While courts properly defer to legislative judgments, this Court has never imposed a rational basis standard in its Eighth Amendment proportionality decisions.

D. Procedural Default

By not raising the issue until afer the original panel decision, the State waived its right to argue that Rummel waived his Eighth Amendment objection by failing to raise it during the punishment stage of his trial. Moreover, the State misconstrues the Texas rule that objections must be made contemporaneous with the first appearance of the objectionable practice. The rule does not apply to an inadvertent or futile failure to object, since the rule derives from Texas courts' efforts to prevent an accused from deliberately foregoing objection at trial to correctible matters in order to preserve ammunition for an appeal if the trial concludes unsuccessfully. Moreover, Rummel can meet

the "good cause"and "actual prejudice" exceptions to the procedural default doctrine. He had good cause to believe that the state trial court would reject an Eighth Amendment challenge to the state habitual offender statute. And he has suffered actual prejudice by serving a much longer sentence than would have occurred if he had prevailed at trial on the Eighth Amendment issue.

E. Prosecutorial Discretion

The State's argument that a decision favoring Rummel's position requires finding an abuse of prosecutorial discretion is superfluous. Rummel challenges the legislature's right to authorize the prosecutor to indict a three-time petty offender under the recidivist statute, not the prosecutor's decision to exercise that power.

F. Rummel's Right to Immediate Release

Since Rummel requested jury sentencing at trial and Texas law gives such a defendant the right to be sentenced by the same jury that convicted him, reversal of his sentence would entitle Rummel to a new trial. Since he would then exercise his right to be tried and sentenced under the 1974 Texas Penal Code, which reduces his third offense to a misdemeanor punishable by a maximum term of one year, Rummel could not be retried because he has served longer than the maximum possible sentence.

ARGUMENT

THE IMPOSITION OF A MANDATORY LIFE SENTENCE PURSUANT TO THE TEXAS RECIDIVIST STATUTE IS SO DISPROPORTIONATE TO THE UNDERLYING OFFENSES FOR WHICH RUMMEL WAS CONVICTED THAT IT CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Article 63 of the old Texas Penal Code mandates a life sentence for anyone convicted of three noncapital felonies. Tex. Penal Code Ann. art. 63 (1925).[4] Rummel contends that the Texas recidivist statute's mandatory life sentence as applied to him is so disproportionate to the seriousness of the three offenses underlying his three felony convictions that it constitutes cruel and unusual punishment forbidden by the Eighth Amendment.[5]

A. The Eighth Amendment Limits Excessively Long Sentences.

Recidivist and enhancement statutes such as the Texas law challenged here are apparently not unconstitutional *per se* under the Eighth Amendment.[6] But such statutes, as with any statute, are not insulated

[4] The 1974 Penal Code preserved article 63, with minor variation, in section 12.42(d). Tex. Penal Code Ann. § 12.42(d) (1974).

[5] It is well settled that the Eighth Amendment applies in full force to the states through the Fourteenth Amendment. Furman v. Georgia, 408 U.S. 238, 257-58 n.1 (1972) (Brennan, J., concurring) (citing Robinson v. California, 370 U.S. 660 (1962)); *id.* at 328 n.34 (Marshall, J., concurring)(same).

[6] *See* Spencer v. Texas, 385 U.S. 554, 560 (1967) (citing cases). The case most frequently cited as precedent for the proposition that habitual offender statutes are not cruel and unusual *per se*, Moore v. Missouri, 159 U.S. 673 (1895) (life sentence for burglary of a home with prior conviction for grand larceny, based on statute mandating maximum sentence upon conviction of second offense punishable by imprisonment), barely touched on the issue as an after-thought to an analysis of a Double Jeopardy claim. The Court made the point that an extended punishment is given not for the earlier crime but rather for the immediate offense as aggravated by the earlier conviction. *See id.* at 677. The Court also relied on *In re* Kemmler, 136 U.S. 436 (1890) (challenging penalty of death by electrocution, imposed for first-degree murder), which turned on the since-discredited assumption, *see* text accompanying notes 9-11 *infra; compare Robinson*, 370 U.S. 660, that punishments are cruel only when they involve torture and lingering death, *see Kemmler*, 136 U.S. at 446-47.

In McDonald v. Massachusetts, 180 U.S. 311 (1901) (25 years for forgery with prior convictions for perjury and theft imposed by statute mandating 25-year sentence upon conviction of any crime and a finding of prior convictions for any two offenses for which prison terms of at least 3-years each had been served), the Court summarily dismissed an Eighth Amendment claim, relying on the same points made in *Moore*.

Subsequent cases merely assumed that *McDonald* and *Moore* settled the issue. *See, e.g.*, Oyler v. Boles, 368 U.S. 448, 451 (1962) (dicta)(life sentence for 2 petitioners convicted of the following sets of offenses: (1) murder with prior convictions for grand larceny, breaking and entering, and burglary, *see* Brief for Petitioners at 4-6, Oyler v. Boles, 368 U.S. 448 (1962); and (2) forgery with prior convictions for forgery and forgery in the first degree,

from challenge as applied in a particular case. If the Texas statute is applied to inflict punishment suffi-

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see id. at 7-8, under a statute mandating a life sentence upon third conviction of any offense punishable by imprisonment; Eighth Amendment issue not raised); Graham v. West Virginia, 224 U.S. 616, 631 (1912) (life sentence for grand larceny with prior convictions for burglary and grand larceny under same statute as that involved in *Oyler*), The Court made the same assumption in discussing article 63 in *Spencer*. 385 U.S. at 560 (dicta) (life sentence under the Texas statute for 3 petitioners convicted of the following sets of offenses: (1) 2 murders with malice, (2) robbery by assault and robbery, and (3) burglary with prior convictions for burglary and theft, *see* Record at 36-37, Reed v. Beto, *consolidated with* Spencer v. Texas, 385 U.S. 554 (1967); Eighth Amendment issue not raised) (citing *McDonald, Oyler,* and a case, Howard v. Fleming, 191 U.S. 126 1903), in which the Court examined a 10-year sentence for swindling and conspiring to defraud in light of the nature of the offenses and concluded that the sentence did not violate the Eighth Amendment, *id.* at 136).

For criticism of the summary treatment of this issue in *Spencer* and the cases on which it relies, see Katkin, *Habitual Offender Laws: A Reconsideration,* 21 Buffalo L. Rev. 99, 113-15 (1971). *See also* Goss v. Bomar, 337 F.2d 341, 342-43 (6th Cir. 1964).

Moore and *Spencer* may be the final word on *per se* Eighth Amendment attacks, which is unfortunate since the primary rationale of those cases—*i.e.,* that a State can increase punishment for the most recent offense as aggravated by the prior offenses—ignores the indiscriminately mandatory nature of the increaed sentence. *Cf.* G. Fletcher, *Rethinking Criminal Law* §6.6.2, at 459-66 (1978) (criticizing such reasoning as inappropriate for a democracy). But those cases dealt only with general application of such statutes in cases brought by defendants who either had

ciently excessive and disproportionate to the underlying offenses,[7] such an application cannot stand.[8]

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not raised the issue, had been convicted of potentially violent or heinous crimes, or in one instance, *McDonald,* had been punished by a term much shorter than life imprisonment. None of those cases discussed—indeed, probably none of the prisoners in those cases except *Oyler* even had standing to raise—the issue raised here, *i.e.,* whether a facially valid recidivist statute that mandates imposition of a life sentence can be unconstitutionally cruel when applied to a person convicted of three petty property offenses.

[7] *See Furman,* 408 U.S. at 242 (Douglas, J., concurring); *compare* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (Stewart, Powell & Stevens, JJ., pluralty opinion) (citing Weems v. United States, 217 U.S. 349, 367 (1910)):

> When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a specific crime) is under consideration, the inquiry into "excessiveness" has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime.

The issue whether an otherwise valid punishment can be unconstitutionally applied when, *inter alia,* there is no actual or potential danger of violence or personal injury requires an as-applied challenge. *Compare* Coker v. Georgia. 433 U.S. 584 (1977) (holding death penalty for rape unconstitutionally excessive, at least when rapist does not take victim's life), *with id.* at 601 (Powell, J., dissenting) (indicating that declaring punishment unconstitutionally cruel as applied to rapes committed with brutality or causing serious injury would require case-by-case examination of circumstances surrounding the offense), *and* Packer, *Making the Punishment Fit the Crime,* 77 Harv. L. Rev. 1071, 1077

Weems v. *United States*, 217 U.S. 349 (1910) (fine and 12 years at *cadena temporal, i.e.*, hard labor with

(1964) (issue whether rapist who has not threatened human life can be executed requires inquiry into justification of penalty in each case rather than legislative decision to permit use of death penality in general, and thus indeterminate, class of cases, which is an "as applied" rather than a *per se* approach).

[8] The concept of proportionality between crime and punishment has considerable historical support. It was one of the earliest principles systematically employed to limit punishment in Western civilization. *See* Carmona v. Ward, 576 F.2d 405, 425 & n.1 (2d Cir. 1978), *cert. denied*, ___ U.S. ___, 99 S. Ct. 874 (1979) (dissenting opinion); Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning*, 57 Cal. L. Rev. 839, 844-45 (1969). The English source documents from which the American Framers drew the Eighth Amendment reflect the English common law principle that prohibited disproportionate punishment. *Carmona*, 576 F.2d at 425-26 (dissenting opinion); Granucci, *supra*, 57 Cal. L. Rev. at 845-47, 860. *See generally id.* at 848-59; *Gregg*, 428 U.S. at 153 (plurality opinion). This concept has survived in England to this day. *See* Brief for Petitioner at 31-32 n.24, Coker v. Georgia, 433 U.S. 584 (1977) (quoting H. Hart, *Punishment and Responsibility* 80 (1968): "we . . . maintain a scale [of punishments] for different offenses which reflects, albeit very roughly, the distinctions felt between the moral gravity of these offenses").

The intent of the American Framers is unclear, since they adopted the Eighth Amendment with little discussion. *Furman*, 408 U.S. at 244 (Douglas, J., concurring); *Weems*, 217 U.S. at 368-69; Granucci, *supra*, 57 Cal. L. Rev. at 842. While it is generally accepted that the Eighth Amendment was directed primarily against torture and barbarous methods of punishment, more recent research suggests that the Framers may have included the concept of proportionality in their understanding of the meaning

chains, plus lifetime restrictions for falsifying a public record), is the only case in which this Court has ever applied the Eighth Amendment to invalidate an excessively long prison term.[9] Although the Court has

of the Eighth Amendment. *See Weems*, 217 U.S. at 372 ("[S]urely, [the Framers jealousy of power had a saner justification than [a fear of abuses no longer practiced]"; *Carmona*, 576 F.2d at 405 (dissenting opinion); I. Brandt, *The Bill of Rights* 464 (1951) ("Beccaria['s] essay *On Crimes and Punishments* [with its emphasis on proportionality between crime and punishment] helped shape our Fifth and Eighth Amendments"). *See also* Ullman v. United States, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting) (Beccaria and his followers influenced American thought in the years following 1776); Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After* Furman v. Georgia, 25 Stan. L. Rev. 62, 63-64 n.7 (1972); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 806-30 (1975) (the Framers were influenced by the writings of many Enlightenment philosophers, including Beccaria, Montesquieu, and Voltaire, who argued based on Rousseau's social contract theory for the principle of proportional punishment). At the very least, scholars have concluded that the Framers intended for the word "cruel" to embody the moral concept of cruelty, in the expectation that the dimensions of that concept would evolve over time. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989, 1031-33 (1978); *see* Trop v. Dulles, 356 U.S. 86, 101 (1958).

[9] Although the *Weems* Court based its decision in part on the inherent cruelty of the punishment, it also relied on the separate grounds that the Eighth Amendment prohibits excessively cruel punishment as well as inherently cruel forms of punishment and

not held a sentence unconstitutionally disproportion-

that the length of punishment must be proportioned to the offense. *Gregg*, 428 U.S. at 171-72 (Stewart, Powell & Stevens, JJ., plurality opinion); *see Weems*, 217 U.S. at 367-68, 371-73, 377; *accord*, Hutto v. Finney, 437 U.S. 678, 685 (1978); *Furman*, 408 U.S. at 325 (Marshall, J., concurring); *compare Weems*, 217 U.S. at 411 (dissenting opinion) (characterizing the majority opinion as holding that "because of the mere term of imprisonment . . . [the sentence can be reviewed for an abuse of legislative discretion]"). *See also* Ingraham v. Wright, 430 U.S. 651, 667 (1977).

The *Weems* opinion relied heavily on Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892), which has been characterized as "an unequivocal statement that the Constitution demands that the punishment fit the crime." *Carmona*, 576 F.2d at 421 (dissenting opinion). Both federal and state courts generally cite *Weems* for the principle that excessive sentence length alone can render a punishment unconstitutionally cruel. Katkin, *supra* note 6, 21 Buffalo L. Rev. at 117 & cases cited at n.82; Comment, *supra* note 8, 24 Buffalo L. Rev. at 831-35 (discussing cases); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 640 (1966); Brief for Petitioner at 34 n.30, Coker v. Georgia, 433 U.S. 584 (1977).

The en banc court in this case refused to recognize *Weems* as good law because of a subsequent decision in Badders v. United States, 240 U.S. 391 (1916), which the court below characterized as "summarily dismiss[ing] a proportionality attack on a five-year sentence." 587 F.2d at 655 n.7. But a five-year sentence hardly compares to a life sentence. Moreover, *Badders*, which does not mention *Weems*, is not even a disproportionality case: the convicted defendant's only Eighth Amendment objection challenged the mail fraud statute's making the deposit of each letter a separate offense. *See* 240 U.S. at 393.

ate in length since *Weems*,[10] recent decisions appear to endorse the continuing vitality of the *Weems* proportionality principle as a restriction on excessively long sentences.[11]

B. Under the *Coker* v. *Georgia* Tests, Rummel's Sentence Is Excessive.

As pointed out recently by Justices Marshall and Powell in dissenting from denial of certiorari in *Carmona* v. *Ward*, ___ U.S. ___, ___, 99 S. Ct. 874, 877 (1979), *denying cert. to* 576 F.2d 405 (2d Cir. 1978)

[10] The Court first applied the Eighth Amendment to the States through the Fourteenth Amendment's Due Process Clause in 1962. *See* cases cited in note 5 *supra*; *cf. O'Neil*, 144 U.S. at 331-33 (rejecting an Eighth Amendment claim on grounds that the issue was not properly presented and that the Eighth Amendment does not apply to the States). Before 1962, the Court discussed the Eighth Amendment in only nine cases. Radin, *supra* note 8, 126 U. Pa. L. Rev. at 997.

[11] Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1378 & n.164 (1979) (citing cases): *see, e.g., Coker*, 433 U.S. at 592 (White, Stewart, Blackmun & Stevens, JJ., plurality opinion); *Gregg*, 428 U.S. at 173 (Stewart, Powell & Stevens, JJ., plurality opinion), *quoted approvingly in Ingraham*, 430 U.S. at 691 n.9 (White, Brennan, Marshall & Stevens, JJ., dissenting); *Furman*, 408 U.S. at 272 n.14 (Brennan, J., concurring); *id.* at 457 (Powell, Burger, Blackmun & Rehnquist, JJ., dissenting). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 370-71 (1978) (Powell, J., dissenting). The general principle seems indisputable, since without it a statute mandating a life sentence upon conviction of one minor parking violation could not be challenged.

(mandatory life sentence for possession of small amount of cocaine):

> Most recently, in *Coker* v. *Georgia*, 433 U.S. 58 . . . (1977), the Court refined the test for assessing Eighth Amendment challenges, concluding that
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> > "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Id.* at 592. . . .
>
> In holding the Georgia death penalty for rape invalid on the latter ground, the Court followed the approach of *Weems*, focusing on the character of the crime, the punishment for the same offense in other jurisdictions, and the penalty for similar crimes in the same jurisdiction.

As articulated in *Coker*, the two excessiveness tests are disjunctive: a punishment that fails under either standard is invalid. Rummel's sentence easily qualifies as excessive under the second *Coker* test and probably satisfies the first test.

1. A Mandatory Life Sentence Is Grossly Disproportionate to the Severity of the Offenses Alleged and Proved.

a. Rummel's Offenses Do Not Justify a Mandatory Life Sentence.

(i) *The Three Petty Offenses for Which Rummel Received a Life Sentence Threatened Neither Violence Nor Societal Injury.*

As the Fifth Circuit panel pointed out, 568 F.2d at 1198 (A. 16), none of the offenses for which Rummel received his life sentence, singly or in sum,[12] justify a severe penalty. In none did Rummel carry a weapon, employ sophisticated implements of crime, or demonstrate any skill in crime. None involved violence or even the threat of violence or danger to anyone.[13]

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[12] Since all three of Rummel's offenses are petty, the issue whether a proportionality test should consider all offenses or only the most recent crime need not be decided in this case. *See Bordenkircher*, 434 U.S. at 371 (Powell, J. dissenting) (characterizing as having limited "societal implications" a conviction for forging an $88.30 check and suggesting the inappropriateness of applying a habitual offender statute to such an offender notwithstanding prior convictions for detaining a female and robbery); Note, *Recidivist Laws Under the Eighth Amendment*—Rummel v. Estelle, 10 Tol. L. Rev. 606, 637-39 (1979) (suggesting that only the most recent offense should appear in the proportionality equation); Note, 1978 Wis. L. Rev. 253, 264 (pointing out that in *Coker* past criminality did not justify imposition of capital punishment for subsequent rape). *See also* note 38 *infra* & accompanying text. For a condemnation of the rationale that punishment should be increased based on previous offenses, see G. Fletcher, *Rethinking Criminal Law* § 6.6.2, at 459-66 (1978).

[13] *Compare Williams, The Courts and Persistent Offenders*, 10 Crim. L. Rev. 730,737 (1963) (quoting a 1911 memorandum that originated the preventive detention system for recidivists in England, which insists that preventive detention ought not apply to

Significantly, the primary offense caused no serious harm, even financial, to the victim,[14] as evidenced by the victim's testimony that he had agreed to drop charges in return for partial reimbursement (R. 158-59; *see* note 2 *supra* & accompanying text). Commentators uniformly condemn the imposition of a life sentence for comparatively petty offenders, even incorrigible ones, as offensive to universal standards of decency.[15] The State's previous suggestion that

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petty thieves, absent violence, weapons, or skill); Pub. L. No. 91-452, tit. X, § 1001(a), 84 Stat. 948, *codified at* 18 U.S.C. § 3575 (1976), authorizing enhanced sentence as "dangerous special offenders" for defendants whose pattern of criminal conduct (1) constitutes a substantial source of their income and (2) manifests "special skill or expertise," defined to include

> manual dexterity, facilitating the initiation, organizing, planning, financing, direction, management, supervision, execution or concealment of criminal conduct, the enlistment of accomplices in such conduct, the escape from detection or apprehension for such conduct, or the disposition of the fruits or proceeds of such conduct.

Id. § 3575(e)(2).

[14] *See Radin, supra* note 8, 126 U. Pa. L. Rev. at 1055 (the second *Coker* test focuses on whether the offender "deserves" the sanction imposed in light of the seriousness of the offense to both the victim and society); Jeffries & Stephan, *supra note* 11, 88 Yale L.J. at 1378 n.168 (a relevant standard for determining the "nature" of the offense is "the directness of the harm to others").

[15] *See, e.g.*, Katkin, *supra* note 6, 21 Buffalo L. Rev. at 120; Packer, *supra* note 7, 77 Harv. L. Rev. at 1080-81. Theft in particular is usually rated as one of the least serious crimes because it is not an offense that "threatens the underpinnings of

Rummel's conduct demonstrates "a real possibility that he would use a weapon to commit his next crime," Respondent's Opposition to Petitioner's Amended Motion for Release at 2, *Rummel* v. *Estelle*, 568 F.2d 1193 (5th Cir. 1978), is ludicrous. The three petty offenses triggering Rummel's life sentence in no way justify the inference that in the future he will injure anyone or harm society. Whether considered in relation to the actual or potential harm caused by the offenses, Rummel's motivation and the temptation he faced before committing each offense, or his "moral fault,"[16] the mandatory life sentence imposed here cannot be justified.

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the social order." Wechsler, *Sentencing Innovations*, in *Sentencing Institute: Violence Today—A Judicial Concern*, 46 F.R.D. 497, 524-25 (1968). For a history of theft, see G. Fletcher, *Rethinking Criminal Law* ch. 1-2, at 1-113 (1978). It would be difficult to find three felonies less serious than Rummel's. *Compare* Tex. Penal Code § 31.03 (d)(4)(A) (Vernon Supp. 1978) (making pig and goat theft a felony, regardless of value); *id.* § 31.07 (making the intentional unconsented use of another's boat or car a felony). *See also* Comment, *A Closer Look at Habitual Criminal Statutes:* Brown v. Paratt *and* Martin v. Paratt, *A Case Study of the Nebraska Law*, 16 Am. Crim. L. Rev. 275, 292 & n. 113 (1979)(citing Rummel as an example of defendants treated unfairly by application of a statute assessing high minimum mandatory penalties).

For an attempt to develop measures of the seriousness of offenses, see T. Sellin & M. Wolfgang, *Delinquency: Selected Studies* (1969).

[16] *Compare Coker*, 433 U.S. at 600 (comparing murder and rape in the severity of harm caused and the "moral depravity" of the

Moreover, such harsh punishment for petty thieves is illogical. As the Fourth Ciruit noted in *Hart* v. *Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied as untimely filed*, 415 U.S. 938 (1974) (holding grossly excessive a mandatory life sentence for writing $50 check on insufficient funds, interstate transportation of forged checks totaling $140, and perjury at son's murder trial):

> Is it a rational exercise of state police power to put a man away for life—at tremendous expense to the state—because over a 20-year period he passed or transported three bad checks and might do it again? Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others. It is not a practical solution to crime in America. Aside from the proportionality principle, there aren't enough prisons in America to hold all the Harts that afflict us.

Id. at 141.

offender). *See generally* Note, *supra* note 9, 79 Harv. L. Rev. at 636; Jeffries & Stephan, *supra* note 11, 88 Yale L.J. at 1371-72, 1378 n.168. Although Rummel concedes that intent is an element of all three of his offenses, *see* Tex. Penal Code arts. 979, 996, 1410, 1413, 1555b (1925), intent to defraud of small amounts of money can hardly compare under any criteria with intent to injure or kill.

(ii) *The En Banc Court Erred in Refusing to Consider the Nature of the Offenses Triggering Application of the Habitual Offender Statute.*

Although the en banc court conceded that proportionality analysis requires consideration of the nature of the offense, it justified its rejection of Rummel's claim in part by refusing to consider the nature of the underlying offenses for which the habitual statute mandated Rummel's life sentence on the grounds that (1) the sentence was imposed for the commission of any three separate and distinct felonies, irrespective of the nature of those felonies, and (2) because Rummel has demonstrated that he cannot conform to society's rules, Texas can brand him a habitual criminal and imprison him for life, subject only to the Parole Board's exercise of its virtually unfettered discretion to parole him if he behaves. 587 F.2d at 659 (A. 36). But the issue is not whether Texas can classify Rummel a habitual offender or enhance his punishment, which Rummel concedes, but whether Texas can enhance his punishment by so much for so little.[17] By refusing to consider the nature of the underlying of-

[17] The en banc opinion challenges Rummel's assertion that his offenses are more trivial than most others and asks "by what authority does Rummel denegrate [*sic*] the interest society has in punishing his crimes?" 587 F.2d at 662 n.29 (A. 41 n.29). But Rummel does not challenge the State's right to punish him; he questions only the excessiveness of that punishment for such petty offenses.

fenses, the en banc court converted Rummel's as-applied challenge into a *per se* challenge and in effect precluded any as-applied challenge to the habitual offender statute, regardless of the triviality of the offenses, as long as those offenses are punishable as criminal. Under the en banc court's rationale, if the State can punish a trivial traffic offense as a crime, then it can punish the third commission of such an offense with a life sentence.

(iii) *The Mere Possibility of Parole Is No Substitute for a Shorter Sentence, Since Rummel Has No Right to Parole and Lifetime Parole Makes Him a Perpetual Prisoner.*

In comparing the seriousness of Rummel's three offenses with the harshness of his sentence, the en banc court discounted the length of Rummel's sentence by the probability of parole based on Texas' liberal system of awarding good time credits, 587 F.2d at 657-59 (A. 33-35), and considered only the constitutionality of an undefined, possibly lesser sentence. The court ultimately conceded that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the [panel] majority's assertion [that Rummel's sentence is grossly disproportionate to his offenses] is probably accurate." *Id.* at 659 (A. 37). Thus, if the en banc court had viewed Rummel's sentence as the term he ac-

tually received, it probably would have decided the case differently.

Several reasons dictate against consideration of good time credit and parole possibilities, especially in the manner in which the en banc court relied on the Texas system. First, as pointed out numerous times by the en banc dissent, *see, e.g.*, 587 F.2d at 666-69 (A. 45-51), accumulation of good time credit is useless to someone given a life sentence, except with respect to determining when one first becomes eligible for parole consideration.[18] Even parole eligibility is of

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[18] The en banc court explained the operation and interaction of the Texas good time credit and parole programs:

> In Texas, a prisoner is eligible for parole after receiving credit for twenty years' imprisonment or after serving one third of his sentence, whichever is less. Tex. Code Crim. Pro. Ann. art. 42.12 § 15(a) (Vernon 1974). Since Rummel is serving a life sentence, he is eligible for parole after accruing credit for twenty years. Texas employs a well-developed system of awarding good time credits. Class I prisoners earn twenty days "good time" per month. Class II prisoners earn ten days "good time" per month, Tex. Civ. Stat. Ann. art. 6184*l* (Vernon 1974), and State-approved trusties earn thirty days credit for each thirty days service. Tex. Penal Code Ann. art. 6184*l* (Vernon 1974) [*sic*]. Thus, a State-approved trusty can serve a life sentence in ten years.
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> . . .
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> . . . As a popular journal has stated:
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> . . . State Approved Trusties (SAT)—half the inmate population—draw two-for-one good time. Every month they serve puts two months in their time accounts; a man with ten remaining years who is made an SAT serves those ten

negligible importance since, as a source quoted by the en banc court points out, "Texas . . . is the most re-

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years in five calendar years. Good time earned also brings parole-eligibility dates closer. The men in the Line are in one of three grades. Lines II and III are disciplinary: Line II draws forty days for every thirty days served, and Line III draws day for day. Everyone else, even men just arriving at the Diagnostic Unit in Huntsville in custody of their county sheriffs, is Line I, which draws fifty days for every thirty served.

Texas has the most liberal good-time laws in the country, which is curious since Texas also gives the longest sentences and is the most reluctant to grant parole.

. . . .

Jackson, *Hard Times*, Texas Monthly, December 1978, 138 at 258.

Considering Texas' good time system, the inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trusty status, even earlier.

587 F.2d at 657-59 (A. 34-35) (footnotes omitted).

The en banc court, in stating that "a [prisoner earning maximum good time credit] can serve a life sentence in ten years," *id.* at 658 (A. 34), apparently misconstrued the interplay between the good time credit and parole systems. With maximum good time credit, a prisoner can become eligible for parole in ten years, but he can never serve a life sentence, even if paroled. *See* text accompanying notes 23-24 *infra*. Thus, the example given by the court below, 587 F.2d at 660 (A. 38), of two states—one that gives a fixed, ten-year sentence and one that assesses a thirty-year sentence with good time credit that makes actual time served only ten years—breaks down when applied to a prisoner given a life sentence, since *no* amount of good time credit permits one to completely discharge a life sentence.

luctant [State in the country] to grant parole." *Id.* at 658 (A. 35).

Second, this Court recently held in *Geenholtz* v. *Inmates*, ___ U.S. ___, 99 S. Ct. 2100 (1979), that the possibility of parole creates no liberty interest protected by Due Process, only "a mere hope" that parole will be obtained, *Id.* at 2105. Consequently, a convicted person has "no constitutional or inherent right . . . to be conditionally released before the expiration of a valid sentence." *Id.* at 2104.[19]

Thus, to deny Rummel his constitutional claim merely because he becomes eligible for parole in twenty years, or less with good behavior, and might eventually be paroled deprives him permanently of the only forum in which he can seek vindication of his constitutional objection to actually serving a life sentence, acknowledged as legitimate by the en banc court. No court will ever again consider his excessive sentence claim before the unconstitutional harm occurs.[20] Accepting the mere possibility of parole as the

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[19] *Compare* United States v. Addonizio, ___ U.S. ___, ___, 99 S. Ct. 2235, 2242 (979) (judge has no "enforcible [*sic*] expectations" concerning actual release of sentenced defendant short of expiration of statutory term).

[20] Even if the Court were to guarantee review should the Parole Board repeatedly deny Rummel parole, waiting to see how the Parole Board will respond is only slightly less useless than relying on the possibility of intervention by the Governor as an excuse for refusing to prevent an unconstitutionally prescribed

proper measure of sentence length even though the legislature mandates a life sentence "make[s] prosecutors, prison wardens, and parole boards the ultimate arbiters in eighth amendment analysis, in which their discretion in enforcing the legislative mandate is substituted by the judiciary for its own."[21]

Such a delegation of the Eighth Amendment determination neither guarantees nor justifies even a realistic expectation that the criteria used by the Parole Board will conform to the Eighth Amendment's proportionality requirement. The Parole Board's decision will depend largely on Rummel's behavior in prison, as well as several other factors not entirely within

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death penalty until after the execution: eventual Court action in either situation occurs too late to prevent the unconstitutional injury.

If Texas law mandated a life sentence for a first offense parking violation, surely the possibility of parole within twenty-four hours would not prevent such a statute from being branded grossly disproportionate. *Compare* Bailey v. Blackburn, No. 78-3306 (5th Cir., June 15, 1979) (per curiam) (affirming dismissal without prejudice for failure to exhaust state remedies on Eighth Amendment claim against Louisiana habitual offender statute—which upon fourth felony conviction mandates sentence of between 20 years (or maximum, whichever is greater) and life—on ground that case may be distinguishable from Rummel's claim because Louisiana law denies parole to prisoner assessed life sentence unless sentence is first commuted by Governor to term of years).

[21] Note, *supra* note 12, 10 Tol. L. Rev. at 633 (criticizing the *Rummel* en banc decision).

Rummel's control, and only insignificantly on the offenses for which he was sentenced. *Rummel*, 587 F.2d at 668-69 (A. 49-51) (en banc dissenting opinion).[22]

Third, if a life sentence without possibility of parole for three petty, nonviolent offenses would be unconstitutional, as the en banc court apparently conceded, 587 F.2d at 659 (A. 37), then surely the added "crime" of a "bad attitude" in prison, virtually guaranteeing rejection of a prisoner's parole application and assuring him of lifetime imprisonment, should not make the sentence any less constitutionally infirm. No one would argue that a "bad attitude" makes more ac-

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[22] The Parole Board has indicated some of the factors it considers in determining an inmate's readiness for parole:

> A clear conduct record is not, in itself, sufficient grounds for granting parole. [T]he traditional prison program of religion, work education and discipline, even at its best, will not guarantee rehabilitation nor genuine readiness for parole. A prisoner may participate zealously in the religious program, he may work hard and he may achieve in education programs; he may keep a spotless conduct record and yet not be genuinely ready for parole. What he achieves in prison in these areas may not be indicative of real feelings, real attitudes and readiness for society. The inmate must be studied from all possible angles to determine if his good behavior is for the benefit of the Parole Board or is actually indicative of a real desire to change.

Texas Board of Pardons and Paroles, *1978 Handbook on Parole, Mandatory Supervision and Executive Clemency* 23 (1978). *See generally id.* at 23-26 (listing other considerations, including the number of prior commitments, age at time of first arrest, personal habits, friends, family background, and the readiness of family and community to receive a parolee).

ceptable the rack or some other cruel method of torture, even if a "good attitude" carried with it the possibility of a reprieve.

Finally, the en banc court treated a trusty's eligibility for parole after serving twelve years not only as a guarantee of parole but also as the equivalent of complete freedom, *see id.* at 658, 660 (A. 34, 38); *cf. id* at 659 n.19 (A. 36 n. 19), which it is not, *see id.* at 666, 668-70 (A. 45-46, 48-49, 52-53) (dissenting opinion). Parole in Texas means release only from incarceration, not from State custody.[23] If paroled, Rummel would be subject to rules and conditions adopted by the Board of Pardons, Tex. Code Crim. Pro. Ann. art. 42.12, §§ 2c, 15(g), 20 (1979), for life, *see id.* § 23, with the threat of prison hanging over him for even minor, noncriminal parole violations, *compare id.* §§ 2c, 15(g), *with id.* §§ 21-22.[24]

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[23] Tex. Code Crim. Pro. Ann. art. 42.12, § 2c (1966); *cf.* Jones v. Cunningham, 371 U.S. 236, 241-43 (1963) [holding that a state prisoner placed on parole is "in custody" within the meaning of the habeas corpus statute because of "significant restraints" on a parolee's liberty).

[24] *Cf.* Erikson & Gibbs, *On the Perceived Severity of Legal Penalties*, 70 J. Crim. Law & Criminology 102 (1979). Such sanctions smack of those condemned as excessive in *Weems:*

> His prison bars and chains are removed, it is true, after [his term of imprisonment ends], but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within the voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted. Such penalties [including chains and hard, painful labor] for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American Commonwealths, and believe it is a precept of justice that punishment for crimes should be graduated and proportioned to offense.

217 U.S. at 366-67.

Thus, Rummel is a perpetual prisoner. No matter how much he rehabilitiates during the next approximately 13,770 days of his life expectancy, he will either die in prison or live on perpetual parole, with the ever-present possibility of re-incarceration. Such a depressing prospect will inevitably breed hopelessness and preclude effective treatment and rehabilitation.[25] In the words of one expert:

> If he qualifies for parole he may be allowed to participate in the life of society but he must suf-

[25] Grosman, *The Treatment of Habitual Criminals in Canada*, 9 Crim. L.Q. 95, 104 (1966-1967); Klein, *Habitual Offender Legislation and the Bargaining Process*, 15 Crim. L.Q. 417, 424-25 (1972-1973); *compare* Advisory Council of Judges of the National Council on Crime and Delinquency, *Model Sentencing Act* § 5 (1963) [hereinafter cited as "*Model Act*"] (providing a life term for no offense execpt first-degree murder), *with id.* §§ 5-6, comment ("A life term, even though the offender is subject to release, is a psychological setback against any treatment other than the passage of time").

> fer the degrading experience of knowing that he will never be free from penal sanctions. For no matter how rehabilitated he may become he must live the rest of his life on parole with the real possibility of re-internment if he violates any of the conditions of his parole. It is not within this man's power to serve his sentence, pay his penalty and enter society again as a free and effective citizen.[26]

Of course, the State cannot guarantee that Rummel will ever be released. The length of time he will serve depends not on the sentencing court or this Court, but on the Parole Board. If the mere possibility that an administrative agency might someday correct an injustice could stay the Court's proper exercise of its power to protect constitutional rights, no sentence would be too harsh, even if the Board never again paroled even a first-offender petty check forgerer. The fact that Rummel will never fully regain his freedom from the threat of life imprisonment and has no judicial recourse if prison and parole authorities choose to require that he serve his entire life sentence for trivial property offenses involving only $230.11 is the cruel and unusual punishment that he challenges here.

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[26] Grosman, *supra* note 25, 9 Crim. L.Q. at 100.

b. No Jurisdiction in the United States or the Free World Punishes Habitual Offenders as Harshly as Texas; and the Trend in Habitual Offender Legislation Is Away from Mandatory Life Sentences and Toward a Requirement that at Least One Offense Involve Violence.

An examination of punishment in other jurisdictions for the same offense[27] reveals that currently only one other state—Washington—retains the statutory authority to impose a mandatory life sentence upon those convicted of any three felonies,[28] and the Washington Supreme Court has indicated that it probably would not permit application of the statute in a case like Rummel's.[29] Every other state and territorial habitual offender statute requires commission of more offenses, at least one violent crime, or both; imposes

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[27] *See* Table 3 (C. 28-112), which lists for each state and territory and under federal law, in chronological order, the minimum and maximum punishments prescribed by each felony habitual offender statute in effect since 1800; Table 4 (C. 113-37), which categorizes—by length and type of punishment and number and type of triggering offenses—and lists all current habitual offender legislation.

[28] The Fourth Circuit in *Hart*, 483 F.2d 136, limited the application of West Virginia's law requiring a life sentence after any three felony convictions.

[29] *State* v. *Lee*, 558 P.2d 236, 240 n.4 (Wash. 1976) (en banc) (dictum) (distinguishing and impliedly approving *Hart*, *see* note 28 *supra*). *See also State* v. *Gibson*, 553 P.2d 131, 135-36 (Wash. App. 1976) (same).

a sentence substantially less than life; or grants discretion to the sentencing authority.[30] Congress limits

[30] The en banc opinion's suggestion that (1) six states might sentence Rummel automatically to a life term and (2) judges and juries in eleven states might have discretion to give him a life sentence, 587 F.2d at 659-60 (A. 37), is inaccurate or irrelevant for the following reasons:

(1) it incorrectly equates discretionary and mandatory sentences, *see* cases cited at 587 F.2d at 669-70 (A. 51-53) (dissenting opinion) (discussing cases decided under the *Ex Post Facto* Clause);

(2) it considers an alleged fourth felony conviction, 587 F.2d at 659 (A. 37), on the basis of a few documents contained in the record (A. 1-3) but never introduced or explained at trial, that could not have been used for enhancement since that conviction occurred, if at all, on the same day as Rummel's conviction under article 63 (*see* A. 3) and since there is no evidence that it was sustained on appeal, *see, e.g., Tyra* v. *State,* 534 S.W.2d 695, 697-98 (Tex. Crim. App. 1976), and that is irrelevant in any event since it was not one of the offenses named in Rummel's indictment (*see* R. 80-81);

(3) it misconstrues eight state statutes—those of Arkansas, Idaho, Louisiana, New Jersey, New Mexico, North Carolina, South Dakota, and Vermont, 587 F.2d at 659-60 & nn.21-23 (A. 37 & nn.21-23)—that could not apply to Rummel because of either the nature of his offenses, when they occurred, or both, *see* Table 4 (C, 113-37); and

(4) it includes two states—West Virginia and Washington, 587 F.2d at 659 & n.20 (A. 37 & n.20)—in which prosecutors are limited by judicial decision, *see* note 29 & text accompanying note 28 *supra.*

The en banc court attempted to demonstrate that the mandatory maximum ten-year sentence that Georgia courts must assess a habitual offender whose last offense is theft is "approximately the same" as Rummel's life sentence because Rummel might be

enhanced punishment for violations of federal laws to only twenty-five years in prison, requires a finding of dangerousness, and insists that the term be "not disproportionate in severity to the maximum term otherwise authorized by law for such felony." Pub. L. No. 91-452, tit. X, § 1001(a), 84 Stat. 948, *codified at* 18 U.S.C. § 3575(b) (1976).[31] All major model legislation and reports condemn life imprisonment and recommend long terms only for those who have committed particularly reprehensible crimes.[32] Indeed, it appears

paroled in twelve years if (and only if) (1) he remains a trusty during that period and (2) the Parole Board chooses to grant parole. 587 F.2d at 660 (A. 38). But even if Rummel were assured of parole, a lifetime of restrictions can hardly be dismissed as insignificant when compared to the *unconditional* release after ten years that a Georgia convict would receive. Moreover, Georgia assesses a mandatory maximum of ten years for theft only on someone convicted four times and only if the fourth offense was committed after the third conviction, so that Rummel could not be sentenced under that provision of Georgia law.

[31] For the origin of this proportionality language, see *Hearings on S. 30 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 185 (1969); Katkin, *supra* note 6, 21 Buffalo L. Rev. at 118.

[32] *See e.g.,* ABA Project on Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 2.5(c), at 81; § 3.3, at 160-62 (Approved Draft 1968) [hereinafter cited as "ABA Sentencing Alternatives"]; ALI, *Model Penal Code* §§ 6.06(1), 6.07(1), 7.03 (1962); *Model Act, supra* note 25, §§ 5, 7-9.

that no other nation in the Free World punishes recidivists as severely as Texas does.[33]

It has been argued that the uniqueness in the severity of the punishment Texas mandates for three-time felons should not weigh against the State. According to this argument, if the Texas approach succeeds in reducing the incidence of recidivism, other States will eventually choose to adopt our method:

> [O]ur federal system . . . allows state legislatures within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results. . . .
>
> Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. . . .
>
> Texas will not remain one of the few jurisdictions imposing a "life" sentence with possibility of parole on habitual criminals if in the future the incidence of recidivism drops relative to States without such a statute. *Social change in such matters generally reveals itself slowly.* The current view of other states may be altered on the basis of Texas' success or failure with the habitual statute.

Brief in Support of Motion for Rehearing in [*sic*] Banc of the Criminal District Attorney of Bexar County, Texas, as Amicus Curiae at 4-5, *Rummel* v. *Estelle*, 568 F.2d 1193 (5th Cir. 1978) (emphasis added).

This argument overlooks several historical factors. First, there is no proof that habitual offender statutes have ever worked as effective deterrents. *Compare* text accompanying notes 55-58 *infra.* Second, if Texas hopes eventually to demonstrate success in deterring recidivism, it may have long to wait, since Texas has punished third-felony offenders with a mandatory life sentence since 1856. *See* 1856 Tex. Laws, Paschal, *Digest of Texas Laws* art. 2464 (1866). Moreover, seventeen states have already "experimented" with a mandatory life sentence for an average of more than forty years apiece, apparently concluded that such a harsh penalty is either ineffective, counterproductive, or inhumane, and revised their laws by either (1) making the sentence discretionary [9 States], (2) limiting the statute's application to violent felonies [1 State], (3) both (1) and (2) [2 States], (4) reducing the mandatory sentence to a term less than life [4 States], or (5) both (1) and (4) [1 State].[34] This trend toward light-

[33] *Compare* Timasheff, *The Treatment of Persistent Offenders Outside of the United States*, in 40 J. Crim. L. & Criminology 455, *passim* (1940); Tappan, Book Review, 65 Harv. L. Rev. 1092, *passim* (1952) (reviewing N. Morris, *The Habitual Criminal* (1951)). *See generally Coker*, 433 U.S. at 596 n.10 (indicating that the penalties imposed by foreign nations are relevant to a proportionality analysis).

[34] *Compare* Table 5 (C. 138-41) (listing every State that has ever enacted a recidivist statute mandating a life sentence without a violent-crime requirement, giving the years during which each statute applied, and describing each statute), *and* Table 8 (C. 204) (categorizing and totaling the current statutes), with

er, discretionary sentences and a violent-crime limitation, beginning in the mid-1920's,[35] is nationwide.[36]

To suggest that the Texas habitual offender statute will serve as a model for other states ignores history and defies logic. Such reasoning would justify the cruelest torture. But the Eighth Amendment, while not denying states the right to experiment, imposes outer limits on what they may do in the laboratories.

C. Texas Punishes No Other Criminal Except One Convicted of a Capital Offense as Harshly as It Punishes a Three-Time Felon, and It Punishes More Dangerous Criminals Much Less Severely.

Table 3 (C. 28-112), Tables 6A-E (C. 142-97), *and* Tables 7A-F (C. 198-203).

[35] General recidivist statutes were a popular legislative response to the dramatic increase in crime—especially gangsterism and racketeering under Prohibition—that occurred after World War I. Monograph, *The Treatment of the Recidivist in the United States,* 23 Can. B. Rev. 638, 642, 660 (1945); *see* Note, *Court Treatment of General Recidivist Statutes,* 48 Colum. L. Rev. 238, 238 (1948). For the European origin of recidivist legislation, see Katkin, *supra* note 6, 21 Buffalo L. Rev. at 99-101; Timasheff, *supra* note 33, *passim.* For the early American statutes, see Monograph, *supra,* 23 Can. B. Rev. at 641-45.

[36] *See* Tables 6-8 (C. 142-204), which categorize, list, and total—by length and type of punishment and type of triggering offenses—the federal, state, and territorial jurisdictions with habitual offender statutes at each five-year interval since 1900.

An examination of punishment imposed in Texas for other offenses[37] "highlights the irrational severity of the life sentence mandated by Article 63." *Rummel,* 568 F.2d at 1199 (A. 17) (panel opinion). As the panel opinion points out, *id.* at 1199 & n.9 (A. 17 n.9), only capital murder is punishable by a mandatory life sentence (or death), Tex. Penal Code Ann. § 19.03 (Vernon 1974). The contrast between even a one-time murderer and a three-time petty offender like Rummel is startling.

First-degree felonies, which include many serious crimes of violence, are punishable by a discretionary term of between 5 and 99 years. Tex. Penal Code Ann. § 12.32 (Vernon 1974); *Rummel,* 568 F.2d at 1199 & n.10 (A. 17 & n.10) (panel opinion). Second-degree felonies—many only marginally less violent than first-degree felonies—are punishable by a discretionary term of between 2 and 20 years and a fine not exceeding $10,000. Tex. Penal Code Ann. § 12.33(a) (Vernon 1974); *Rummel,* 568 F.2d a 1199 & n.11. After the second commission of any felony, the punishment is that of the next highest category of felony. Tex. Penal Code Ann. §12.42(a)-(c) (Vernon 1974). Thus, such a repeater can be sentenced to a term of between 2 and 20 years if the second conviction is for a third-degree felony, and between 5 and 99 years if for a second-degree felony. Although ninety-nine years is equiva-

[37] For a list of offenses under Texas law, categorized by degree, see Table 2 (C. 22-27).

lent to a life sentence, its imposition for a second-degree felon with a prior felony conviction is discretionary, not mandatory.

The en banc court refused to compare the punishment for various single offenses in Texas with the life sentence Rummel received for three petty offenses, on the ground that Rummel's sentence resulted from his status as a habitual criminal, not from the commission of any one offense. 587 F.2d at 660 (A. 36). Rummel's status, however, is already based in part on the nature of each offense (*i.e.*, all must be felonies), and surely no one would contend that Rummel's repetitive but petty, cheating conduct caused more harm to society than the commission of one or two murders, rapes, or kidnappings.

In further contrast, since 1974 Rummel's last offense has carried a maximum sentence in Texas of only *one year*, even for a person with two prior felony convictions.[38]

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[38] If Rummel's theft by false pretext had been committed after January 1, 1974, it would have been only a misdemeanor, 1973 Tex. Gen. Laws, c. 399, § 31.03(d)(3), at 930, *as amended*, Texas Penal Code § 31.03(d)(3) (Vernon Supp. 1978) (theft of property valued between $20 and $200); *see* Texas Penal Code § 31.02 (Vernon 1974) (theft as defined in section 31.03 includes [in subsection (b)(1)] the offense previously called theft by false pretext), carrying a maximum punishment of only one year in prison and a $2,000 fine, *id.* § 12.21. Even under the new Penal Code's habitual misdemeanant statute, *id.* § 12.43(a), which applies to anyone on trial for a Class A misdemeanor who has a prior

2. The Life Sentence Mandated by Texas Law Makes a Negligible Contribution to Acceptable Goals of Punishment.

After rejecting Rummel's claim that his life sentence is grossly disproportionate to his crimes, the en banc court refused to consider the statutory purposes of the Texas recidivist law,[39] even though *Coker* makes clear that a punishment may be excessive if it fails to make a measurable contribution to any legitimate penal goal. 433 U.S. at 592; *see id.* n.4 (the converse applies).[40] Every conceivable legislative pur-

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conviction for a Class A misdemeanor or for any felony, Rummel's prison term could not exceed one year.

This reduced sentence highlights both the relatively trivial nature of the offenses and the public's increasingly more sophisticated enlightenment concerning incarceration and treatment of habitual offenders. *Compare Weems*, 217 U.S. at 378 (the cruel and unusual punishment clauses is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice") (*quoted in Furman*, 408 U.S. at 242 (Douglas, J., concurring)).

[39] 587 F.2d at 661 (A. 39). *See also* note 57 *infra*.

[40] *Compare Furman*, 408 U.S. at 279 **(Brennan, J., concurring)** (pointing out that the standard as expressed in *Coker* incorporates the standard as expressed in *Hart*, 483 F.2d 136). *See also id.* at 300, 311, 331 (views of Justices Brennan, White, and Marshall, respectively, on the need for a "least drastic means" test); Jeffries & Stephan, *supra* note 11, at 1365-66 (discussing *In re Winship*, 397 U.S. 358 (1970), which held that Due Process requires for conviction proof beyond a reasonable doubt of every element of the offense charged, and arguing that the purpose of

pose behind Rummel's life sentence—whether isolation, deterrence, rehabilitation,[41] or retribution[42]—either is undermined by article 63 or is served so irrationally by the law's application to Rummel that the objective becomes unacceptable.[43]

a. Since Judges and Juries Give Lengthy Sentences To Non-Petty Offenders, Recidivist Laws Isolate Only Petty Offenders, Who Remain Incarcerated for a Much Longer Period than Societal Protection Requires.

Isolation of the habitual criminal for societal protection is an acceptable objective only to the extent

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the presumption of innocence as embodied in the reasonable doubt standard can be served effectively only if the State is required to prove beyond a reasonable doubt a "constitutionally adequate basis for imposing the punishment authorized").

[41] Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (Goldberg, Douglas & Brennan, JJ., dissenting from denial of certiorari); *Spencer*, 385 U.S. at 571 (Warren, C.J., concurring and dissenting); Tex. Penal Code Ann. § 1.02(1) (A)-(C) (Vernon 1974); *id.*, Practice Commentary; *see* Packer, *supra* note 7, 77 Harv. L. Rev. at 1079-81; Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1028 & n.153.

[42] *Id.*; G. Fletcher, *Rethinking Criminal Law* § 6.3.2, at 414-15 (1978).

[43] *See generally* Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1053, 1055 (the *Coker* "measurable contribution" test appears to require that punishment yield some social gain, perhaps even a net gain compared to the harm caused by the pain inflicted on the offender).

that the punishment prescribed in penal statutes enacted for that purpose appears reasonably necessary to preserve public safety. Most recidivist laws, however, even those more rationally selective in their application than the Texas statute, are ineffective and superfluous to society's legitimate concern for protection. Studies consistently reveal that such statutes fail to isolate the true threat to the social order—the professional, dangerous criminal.[44] Such gangsters, by escaping detection or conviction, often have no prior record upon which to base a habitual offender charge[45] or shrewdly plea bargain for lighter sentences.[46] More-

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[44] Grosman, *supra* note 25, 9 Crim. L.Q. at 101-04; Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106-08, 112; Klein, *supra* note 25, 15 Crim. L.Q. at 421, 433-35; Lynch, *Parole and the Habitual Criminal*, 13 McGill L.J. 632, 633-34, 638, 644 (1967); Murrah, *The Dangerous Offender Under the Model Sentencing Act*, 45 F.R.D. 161, 165 (1967); Tappan, *supra* note 33, 65 Harv. L. Rev. at 1094; Williams, *supra* note 13, 10 Crim. L. Rev. at 730-31, 737; Monograph, *supra* note 35, 23 Can. B. Rev. at 663-64.

Statistics indicate that "most serious offenders never repeat their crimes." S. Rubin, *The Law of Criminal Correction* 466 (2d ed. 1973); *cf.* Lynch, *supra*, 13 McGill L.J. at 643 (parolees convicted for unpremeditated crimes have the lowest rate of recidivism). Thus, most nonprofessional convicts who commit one serious crime rarely become recidivists.

[45] Klein, *supra* note 25, 15 Crim. L.Q. at 423; Monograph; *supra* note 35, 23 Can. B. Rev. at 665.

[46] Johnson, *Sentencing in the Criminal District Courts*, 9 Hous. L. Rev. 944, 981 (1972); Katkin, *supra* note 6, 21 Buffalo L. Rev. at 109 (since cases involving professional criminals tend to be complex, prosecutors prefer to plea bargan for a lighter sentence);

over, judges and juries assess an offender with prior convictions indicating dangerousness such a long sentence for the most recent offense that the automatically enhanced sentence is superfluous.[47]

Instead, recidivist laws typically ensnare mostly the petty thief, who may be a nuisance but threatens no one.[48] Ironically, by the time most such petty thieves are imprisoned as habitual criminals, their propensity for criminal activity has declined with age and maturity.[49] The result is a needless drain on state resources and the loss of potentially productive citizens. Even though society has a legitimate interest in removing such misfits from the general population for a time, when the actual sentence greatly exceeds that normally imposed on others with similar convictions who have not been charged as habitual offenders,[50]

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see Cuomo, *Mens Rea and Status Criminality,* 40 S. Cal. L. Rev. 463, 469 (1967).

[47] Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106; Klein, *supra* note 25, 15 Crim. L.Q. at 423.

[48] *See* authorities cited in note 44 *supra.*

[49] Grosman, *supra* note 25, 9 Crim. L.Q. at 103; Klein, *supra* note 25, 15 Crim. L.Q. at 435; *see Model Act, supra* note 25, §§ 5-6, comment ("The surge of aggression, of violent action, is a characteristic of the young rather than the old offender.").

[50] A study indicates that with two prior convictions, Rummel probably would have received a 10-year sentence if he had not been convicted as a habitual offender. *See* Comment, *Texas Sentencing Practices: A Statistical Study,* 45 Texas L. Rev. 471, 482-83, 485, 491-93 (1967).

one can assume that societal protection does not warrant a large portion of the longer sentence[51] and that the sentence thus serves no legitimate purpose.

b. Since Non-Petty Offenders Can Anticipate Lengthy Sentences from Judges and Juries, Habitual Offender Statutes Deter Only Petty Offenders, Who Would Be Effectively Deterred by a Much Shorter Sentence.

Even accepting the dubious assumption that the potential offender understands the nuances in each State's habitual offender statute,[52] a punishment deters effectively only if it is proportioned to the gravity of the crime.[53] When petty theft and forgery are punished like armed robbery and murder, a criminal has

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[51] *Accord,* Note, *Statutory Structures for Sentencing Felons to Prison,* 60 Colum. L. Rev. 1156, 1159 (1960). Penologists generally recognize that a diagnosis of incorrigibility should grow out of a study of the offender's personality, not merely the number of prior convictions. *E.g.,* Monograph, *supra* note 35, 23 Can. B. Rev. at 639 (forward by T. Sellin); *accord,* Williams v. New York, 337 U.S. 241, 247 & authorities cited in n.8 (1949).

[52] *See generally* Note, *supra* note 51, 60 Colum. L. Rev. at 1159-60 (expressing skepticism).

[53] *See* Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment,* 24 Stan. L. Rev. 838, 848-50 (1972).

no incentive to commit the less serious offense, and real distinctions between offenses blur:

> All penalties ought to be proportioned to the nature of the offense. . . . [W]here the same undistinguishing severity is exerted against all offenses, the people tend to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of lightest dye.[54]

Moreover, habitual offender laws do not deter commission of serious offenses, since dangerous criminals surely harbor no illusions that upon apprehension and conviction they would be sentenced lightly if the enhancement statute did not exist.[55] At best, a harsh sentence like that imposed by article 63 deters only petty offenders who in and of themselves do not deserve long-term confinement[56] and would be deterred, if at all, by the prospect of a much less severe sentence.[57] More likely, however, is that fear of the extraordinary severity of a mandatory life sentence

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[54] N. H. Const., Bill of Rights § 18 (1783), in 1 *The Bill of Rights* 377 (B. Schwartz ed. 1971); *see* Wheeler, *supra* note 8, 25 Stan. L. Rev. at 75; Williams, *supra note* 13, 10 Crim. L. Rev. at 737-38.

[55] *Accord,* Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106. Statistics on sentencing in Texas document the severity of sentences imposed on violent felony offenders. *See* Comment, *supra* note 50, 45 Texas L. Rev. at 482-83, 485, 491-92.

[56] *Accord,* Katkin, *supra* note 6, 21 Buffalo L. Rev. at 106.

[57] The en banc court rejected this "lack of necessity" rationale based on the fear that the State could never prove that a sentence

would induce a previously convicted felon who commits a relatively trivial third offense to perpetrate a more serious crime (*e.g.,* inflicting serious injury while resisting arrest) to avoid apprehension out of fear of a mandatory life sentence.[58]

c. Life Imprisonment Will Not Rehabilitate.

No one could seriously contend that the prospect of permanent incarceration, or long-term confinement followed by permanent parole, serves a rehabilitative function. To the contrary, such a sentence psychologically devastates the recipient.[59] Even were this not

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of one length deterred more effectively than a shorter sentence. 587 F.2d at 661 (A. 39-40) (quoting Wheeler, *supra* note 8, 25 Stan. L. Rev. at 77-78). But this criticism fails to recognize that (1) reserving the issue of who bears the burden of proof, Rummel has demonstrated that the punishment imposed is grossly excessive, and (2) if the inquiry is limited to whether a *significantly* less severe punishment would accomplish the purpose equally as well, the comparison would not require such fine distinctions.

[58] *See* Comment, *supra* note 8, 24 Buffalo L. Rev. at 809-10.

[59] Klein, *supra* note 25, 15 Crim. L. Q. at 424-25; *see* Williams, *supra* note 13, 10 Crim. L. Rev. at 731; Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems,* 56 Va. L. Rev. 602, 604 (1970); text accompanying notes 25-26 *supra.* In the graphic words of one prisoner who had undergone extensive psychotherapeutic treatment:

> To be taken without consent from my home and friends; to lose my liberty; to undergo all those assaults on my personality which modern psychotherapy knows how to deliver; to be re-made after some pattern of "normality" hatched in a

so, it is unclear how a third, longer term of imprisonment will rehabilitate the recidivist when it has twice failed.[60] Nonetheless, in the words of one commentator, the traditional method of treating the habitual criminal has been "to increase the severity of his punishment as if the remedy lay in increasing the dosage of medicine which failed to cure in small quantities."[61]

d. Retribution Is Permissible Only if Punishment Is Proportioned to the Offenses Being Punished.

> Viennese laboratory to which I never professed allegiance; to know that this process will never end until either my captors have succeeded or I grown wise enough to cheat them with apparent success—who cares whether this is called Punishment or not?

Schreiber, *supra*, 56 Va. L. Rev. at 612.

[60] *Accord*, Lewis, *The Humanitarian Theory of Punishment*, 6 Res Judicatae 224, (1953); Comment, *Recidivism: The Treatment of the Habitual Offender*, 7 U. Rich. L. Rev. 525, 527 (1973); *compare* Tappan, *supra* note 33, 65 Harv. L. Rev. at 1094 (discussing the European system of imprisonment followed by a more lenient period of treatment). *See generally* Robison, *The Effectiveness of Correctional Programs*, 17 Crime & Delinquency 67, 71-72 (1971) (research suggests imprisonment does not rehabilitate a criminal and may cause positive harm); Schreiber, *supra* note 59, 56 Va. L. Rev. at 604 n.12. *See also* Monograph, *supra* note 35, 23 Can. B. Rev. at 638 (foreword by T. Sellin).

[61] *Id.* at 637.

Rejected as a legitimate penal goal by many,[62] retribution is a basic purpose of recidivist statutes.[63] The ancient doctrine of revenge recognizes that punishment for its own sake is acceptable, but only to the extent that it is proportional to the offense committed.[64]

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[62] *See, e.g.*, Comment, *supra* note 8, 24 Buffalo L. Rev at 809; *compare Rudolph*, 375 U.S. at 891.

[63] Monograph, *supra* note 35, 23 Can. B. Rev. at 640. Although true in general, the accuracy of this observation as the recidivist statute is applied must be questioned, since community outrage is usually a reaction to a defendant's most recent crime, virtually unaffected by the existence of prior convictions. *See* Note, *supra* note 51, 60 Colum. L. Rev. at 1158-59. Moreover, the victim in this case apparently does not desire revenge, since he was willing to agree not to prosecute. *See* note 2 *supra*.

[64] Packer, *supra* note 7, 77 Harv. L. Rev. at 1078; Wheeler, *supra* note 53, 24 Stan. L. Rev. at 846. After all, "[t]he true design of all punishments [is] to reform, not to exterminate [or permanently isolate] mankind." N. H. Const. Bill of Rights § 18 (1973), in 1 *The Bill of Rights* 377 (B. Schwartz ed. 1971). *See also* G. Fletcher, *Rethinking Criminal Law* § 6.3.2, at 416-17 (1978).

e. A Mandatory Life Sentence that Is Not Restricted in the Nature of the Offenses for Which It Is Imposed Serves No Coherent Policy Because It Is So Severe that Judges, Prosecutors, and Juries Restrict Enforcement of the Statute Requiring Its Imposition.

Habitual offender statutes, especially those like article 63 that by their terms apply indiscriminately irrespective of the nature of the underlying offenses, almost by definition advance no coherent policy,[65] for several reasons. First, as revealed by studies in more than a dozen states and in other countries,[66] recidivist statutes are seldom used by judges, who consider them too harsh and invariably fashion cumbersome

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[65] *See* N. Morris, *Towards Principled Sentencing,* 37 Md. L. Rev. 267, 279 (1977) ("[l]egislation [providing for mandatory minimum sentences] is unprincipled and morally insensible: it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy"); *compare Furman,* 408 U.S. at 402-03 (Burger, C.J., dissenting) (it is "widely accepted that mandatory sentences do not best serve [legitimate penal purposes]").

[66] Grosman, *supra* note 25, 9 Crim. L.Q. at 104; Monograph, *supra* note 35, 23 Can. B. Rev. at 658-59, 661 663-64; *see* Williams, *supra* note 13, 10 Crim. L. Rev. at 733. *See generally* Brown, *West Virginia Habitual Criminal Law,* 59 W. Va. L. Rev. 30, 37-42 (1956); Tappan, *Habitual Offender Laws in the United States* 13 Fed. Prob. 28, 29-31 (Mar. 1949); Note, *Strict or Liberal Construction of Penal Statutes,* 48 Harv. L. Rev. 748, 750 (1935).

rules to restrict application of such laws.[67] Due partly to such artificial judicial constructs, habitual offender laws neither measurably deter nor isolate most of those covered by a literal reading of the statute.[68]

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[67] Monograph, *supra* note 35, 23 Can. B. Rev. at 661-63; Note, *supra* note 35, 48 Colum. L. Rev. at 249-53. In the 1920's, when New York prosecutors heavily used that State's recidivist provision, which then mandated a life sentence upon third conviction for any felony, judges openly defied the Legislature by using strained interpretations to circumvent the statute. Finally, the Legislature relented and revised the law to give courts discretion. Similar criticisms convinced lawmakers in other states to do likewise. Monograph, *supra* note 35, 23 Can. B. Rev. at 660-664; Note, *supra* note 35, 48 Colum. L. Rev. at 238-39.

Texas judges have also interpreted article 63 and its successor, section 12.42(d), strictly. *See, e.g., Tyra,* 534 S.W.2d at 697-98 (no enhancement under article 63 unless State proves each succeeding conviction was subsequent to both commission of and conviction for immediately preceding offense); Carvajal v. State, 529 S.W.2d 517, 521 (Tex. Crim. App. 1975), *cert. denied,* 424 U.S. 926 (1976) (prior convictions cannot be used more than once to enhance punishment under section 12.42(d)); Cain v. State, 468 S.W.2d 856, 858-59 (Tex. Crim. App. 1971) (to prove prior felonies, mere introduction of certified copies of prior judgments and sentences are insufficient to show identity); Doby v. State, 454 S.W.2d 411, 413 (Tex. Crim. App. 1970) (prior conviction for capital offense cannot be used for enhancement under article 63); *Ex parte* Scafe, 334 S.W.2d 170, 171 (Tex. Crim. App. 1960) (no enhancement unless both prior convictions were for acts illegal in Texas); Cromeans v. State, 268 S.W.2d 133, 135 (Tex. Crim. App. 1954) (no enhancement if defendant received suspended sentence for either of two prior convictions).

[68] Note, *supra* note 35, 48 Colum. L. Rev. at 238.

Second, studies indicate clearly that prosecutors nullify recidivist statutes by plea bargaining.[69] This may place undue pressure on the innocent to plead guilty[70] and often results in both private negotiations not subject to meaningful court review for fairness[71] and a sentence related to neither the specific facts of the case, the defendant's rehabilitative needs, nor the societal interest in vigorous prosecution.[72] The effect

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[69] Klein, *supra* note 25, 15 Crim. L.Q. at 426, 429; *see* Mewett, *Habitual Criminal Legislation Under the Criminal Code,* 39 Can. B. Rev. 43, 44 (1961); Monograph, *supra* note 35, 23 Can. B. Rev. at 664. Texas prosecutors commonly plea bargain in burglary, robbery, and theft cases, dropping the habitual count in return for a guilty plea. Ferguson, *The Law of Recidivism in Texas,* 13 McGill L.J. 663 n.4 (1967); Johnson, *supra* note 46, 9 Hous. L. Rev. at 969.

[70] *Accord,* Langbein, *Torture and Plea Bargaining,* 46 U. Chi. L. Rev. 3, 13 n.24 (1978) (arguing that to determine whether a potentially harsh sentence can coerce guilty pleas from the innocent, one need only imagine "a differential so great (*e.g.*, death versus a fifty-cent fine) that any reasonable defendant would waive the strongest defenses"); *id.* at 16.

[71] Johnson, *supra* note 46, 9 Hous. L. Rev. at 980. *See generally* Langbein, *supra* note 70, 46 U. Chi. L. Rev. at 18 (warning against concentration in the prosecutor's hands of the accusatory, adjudicatory, and sanctional phases of criminal procedure).

[72] *Id.* at 978; Note, 24 Baylor L. Rev. 153, 156 (1972); *see* Comment, *supra* note 15, 16 Am. Crim. L. Rev. at 295, 305 & n.132. For example, prosecutors often choose to ignore non-forum state convictions for enhancement to avoid cumbersome evidentiary requirements. Brown *supra* note 50, 59 W. Va. L. Rev. at 46; *compare* note 67 *supra.*

of the statute and its application depend on each prosecutor's belief in the soundness of the recidivist statute in general or as to a particular defendant, with radically uneven enforcement among jurisdictions.[73]

Finally, as the minimum sentence imposed by a habitual offender statute increases, historically the incidence of jury nullifications has also risen.[74]

Thus, the more severe the recidivist sentence, the greater the incidence of nullification by individual judges, prosecutors, and jurors. This commensurately

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[73] Mewett, *supra* note 69, 39 Can. B. Rev. at 44-45; *compare* Ferguson, *supra* note 69, 13 McGill L.J. at 663 n.1. Several studies and reported cases indicate that prosecutors rarely invoke recidivist statutes. Comment, *supra* note 15, 16 Am. Crim. L. Rev. at 277 n.4.

One can reasonably surmise that the weaker the case, the greater the incentive for the prosecutor to press plea bargaining. *Accord,* Johnson, *supra* note 46, 9 Hous. L. Rev. at 979; *see* Note, *supra* note 72, 24 Baylor L. Rev. at 156; *cf. Gregg,* 428 U.S. at 225 (White J. concurring) (in deciding whether to request the death penalty, prosecutors are motivated primarily by the strength of their cases).

[74] Monograph, *supra* note 35, 23 Can. B. Rev. at 661; Wheeler, *supra* note 53, 24 Stan. L. Rev. at 850; Note, *supra* note 35, 48 Colum. L. Rev. at 250-51. *But cf.* text accompanying note 77 *infra* (jury cannot be informed of punishment that would be imposed under old article 63 or new section 12.42(d)). *See also Bordenkircher,* 434 U.S. at 369 n.2 (Blackmun, Brennan & Marshall, JJ., dissenting).

increases the incidence of potentially arbitrary variations in application standards[75] and shatters any illusions that habitual offender statutes, especially those mandating life imprisonment for a fixed number of crimes that include petty property offenses, contribute constructively to any legitimate penal objective.[76]

3. The Mandatory Nature of the Texas Statute Deprived Rummel of Any Opportunity to Present Evidence of Mitigating Circumstances at the Punishment Stage of the Trial.

If a judge or jury had a range of sentencing discretion under the Texas habitual offender statute and the defendant had a fair opportunity to produce mitigating evidence during the punishment phase of trial, a life sentence imposed under such a procedure, reflecting a rejection of the defendant's mitigating evidence by the factfinder, should be virtually immune

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[75] *Accord,* ABA Sentencing Alternatives, *supra* note 32, *id.* § 3.3(d), at 167.

[76] The Texas Legislature, by amending the laws governing theft to raise from $50 to $200 the amount necessary to constitute a felony, *see* note 38 *supra,* apparently concluded that for a person with two prior felony convictions who commits a theft of less than $200, life imprisonment serves no critical penological objective.

from attack on Eighth Amendment grounds.[77] But the mandatory nature of the Texas statute eliminates the opportunity to present mitigating circumstances and occasionally produces incongruous sentences like Rummel's. The only question open during the punishment stage of an article 63 case is whether the State has proved that the defendant committed the two prior felony convictions alleged in the indictment. *See, e.g., Blackwell* v. *State,* 510 S.W.2d 952, 954-55 (Tex. Crim. App. 1974). Neither the judge nor the parties can inform the jury that an affirmative answer condemns the defendant to an automatic life sentence.[78]

It is now settled law that a mandatory death penalty is impermissible "in all but the rarest kind of capital case."[79] Despite the unique severity of the death penalty,[80] the disproportionality rationale employed in capital punishment cases applies equally to

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[77] *But see* Davis v. Davis, No. 77-1782 (4th Cir., June 29, 1979) (en banc), *aff'g* Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977) (ruling unconstitutionally excessive a jury-assessed 40-year sentence and $20,000 fine for possession and distribution of 9 ounces of marijuana).

[78] Bevill v. State, 573 S.W.2d 781, 783-84 (Tex. Crim. App. 1978) (en banc).

[79] Lockett v. Ohio, 438 U.S. 586, 604 n.11 (1978) (reserving opinion with respect to murder by a person serving a life term).

[80] Admittedly, the Court has carefully distinguished capital and non-capital cases. *E.g., id.* at 2964-65 & n.11. But non-capital cases rarely raise the mandatory-discretionary inquiry in a setting as extreme as this case. Moreover, Rummel asks not that

this case and argues that the Court should reject as cruel and unusual the mandatory life sentence Rummel received for his three petty property offenses. *See also Rummel,* 587 F.2d at 664-70 (dissenting opinion) (discussing Ex Post Facto cases).

Article 63 is a statute lacking both compassion and the possibility of compassion. When applied to offenses as trivial as those for which Rummel was convicted, it serves no function but a mindless, vindictive retribution that has no place in a civilized society.

4. Subjectivity, Inherent in Many Constitutional Principles, Has a Negligible Effect on the Outcome of this Case and Is No Justification for Refusing to Examine Potentially Unconstitutional Conduct.

The en banc court, apparently concerned about the inevitably subjective nature of the *Coker* test, criticized Rummel's characterization of his offenses as trivial, suggested that his analysis gives no indication of a usable standard but the amount of money involved, and predicted a flood of litigation taking this Court down the "slippery slope." *See id.* at 662 & n.29 (A. 40-41 & n.29); *accord, Rummel,* 568 F.2d at 1201-02 & n.3 (A. 21-23 & n.3) (panel dissenting opinion).

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his sentence be invalidated solely because it was imposed automatically, but only that the mandatory nature of his punishment be viewed as an additional factor tipping the scales towards disproportionality.

Admittedly, like many other constitutional standards, no Eighth Amendment analysis can be wholly objective, given the nature of the issue and its relation to evolving standards of decency. *See, e.g.,* note 38 *supra.* Accordingly, criteria selected to evaluate proportionality should be viewed as limiting judicial subjectivity, not replacing it. The critical issue is not whether a proportionality determination is subjective, but rather whether proportionality is a sufficiently important objective that its attainment justifies some sacrifice in objectivity. To this issue, the Court has clearly answered in the affirmative. *See, e.g.,* text accompanying notes 9-11 *supra.*

The standard articulated in *Coker* is a workable one, as other federal and state courts that have employed a similar analysis for years in reviewing lengthy sentences can testify.[81] The test turns on po-

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[81] *See, e.g., In re* Lynch, 105 Cal. Rptr. 217, 503 P.2d 921, 929 & n.13, 930-31, 933 (1973) (en banc) (discussing cases in Alaska, California, New Jersey, New York, North Carolina, Oregon, South Carolina, Washington and West Virginia); State v. Freeman, 223 Kan. 362, 574 P.2d 950, 956 (1978); People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338 (1975); *cf.* D. Fellman, *The Defendant's Rights Today* 405-06 (1976 ed.) (describing cases in numerous states).

Although the en banc court pointed to the difficulty of distinguishing between thousands of combinations of offenses, 587 F.2d at 662 n.29 (A. 41 n.29), neither the Fifth nor Fourth Circuits have had difficulty drawing the line. *See, e.g.,* Chapman v. Estelle, 593 F.2d 687, 688 n.1 (5th Cir. 1979) (Thornberry, Clark

tential violence and societal harm, not a dollar sign; if Rummel had taken the same amount by violent means or caused grievous injury to a victim,[82] he

& Roney, JJ.) (two burglaries and forgery; "[e]ven the original panel in *Rummel* . . . would likely reject [the Eighth Amendment] claim"); Griffin v. Warden, 517 F.2d 756 (4th Cir.), *cert. denied*, 423 U.S. 990 (1975) (grand larceny, breaking and entering grocery store, and burglary of residence; held not disproportionate).

[82] To characterize crimes involving potential violence as significantly more serious than nonviolent property offenses can be justified on the ground that, almost without exception, crimes involving great danger to the physical well-being of others carry the severest sentences. Wheeler, *supra* note 53, 24 Stan. L . Rev. at 862 & n.107; *see, e.g.*, Comment, *supra* note 50, 45 Texas L. Rev. at 482-83, 491-93 (statistically demonstrating such a relationship between violence and assessed term of incarceration in Texas, except for a wide disparity between the expected sentence upon conviction for a third nonviolent property felony if not sentenced under article 63—approximately ten years—and the life sentence assessed under that statute); *compare* Table 2 (C. 22-27), which lists all felonies under Texas law, by degree, demonstrating that only violent crimes are classified as first-degree felonies and that few nonviolent crimes are classified as second-degree felonies.

Even the so-called "victimless" crime of narcotics use, according to experts, may induce a user to commit violent acts and lead ultimately to a disintegration of the social order. *E.g.*, Snyder, *Catecholamines in the Brain as Mediators of Amphetamine Psychosis*, 27 Archives of Gen. Psychiatry 169, 171 (Aug. 1972) (discussing amphetamine and cocaine psychosis). *See generally Carmona*, 576 F.2d at 411-12 (discussing the threat to society posed by narcotics use); *Broadie*, 332 N.E.2d at 342-43 (marijuana).

would likely have forfeited any constitutional objection to his sentence.

Moreover, under the *Coker* rationale, the requirement that the sentence be *grossly* disproportionate to the offenses rather than merely disproportionate circumscribes this inevitable subjectivity by drastically reducing the number of cases in which the punishment will appear even arguably excessive. In this case, where Rummel's mandatory life sentence is grossly excessive by any measure, subjectivity is a false issue.

In any event, however, criticism that the proportionality test (and, in particular, its nature-of-the-offense element) is subjective can be answered only by acknowledging that observation's partial accuracy, demanding adherence to criteria that minimize subjectivity, and recognizing that imperfections in the best available test do not justify "abdication of fundamental responsibility in the guise of judicial restraint." *Rummel*, 568 F.2d at 1202 (A. 22) (panel dissenting opinion).[83] As the *Weems* court recognized, when the legislature's exercise of its "legislative power to define crimes and fix their punishment . . . encounters in its exercise a constitutional prohibition[,] . . . not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked." 217

[83] The legitimate concern that judges not substitute their own "conceptions of wisdom and propriety," *Rummel*, 568 F.2d at 1202 (A. 22) (dissenting opinion), does not preclude the courts from assessing the gravity of the crimes. The court's ability to

U.S. at 378; *accord, Furman,* 408 U.S. at 313-14 (White, J., concurring).

C. The Rational Basis Test Imposed by the En Banc Court Has No Place in an Eighth Amendment Proportionality Analysis.

The en banc court demanded that a punishment, to be unconstitutionally disproportionate, have no rational basis. 587 F.2d at 655-56, 661-62 (A 30-31, 40-41). In doing so, it effectively supplanted the disproportionality test of *Coker* with the rational basis

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review statutory punishments would be meaningless without such judgments. As Justice Brennan observed in *Furman*:

> Judicial enforcement of the [Cruel and Unusual Punishment] Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.
>
> That is precisely the reason the Clause appears in the Bill of Rights.

408 U.S. at 269 (concurring opinion).

Nor need this Court fear a flood of litigation. No jurisidiction in which courts have reversed sentences based on a proportionality rationale has experienced such a problem. *Cf.* Comment, *supra* note 15, 16 Am. Crim. L. Rev. at 285 & n.70 (citing the 20 lower court cases to date in 17 different jurisdictions holding sentences grossly excessive).

Moreover, if the Court agrees that the line should be drawn at three nonviolent property offenses, few cases will qualify. Taking the number of reported opinions in the Texas Court of Criminal Appeals as an approximation, not many more than 380 inmates have received life sentences as habitual criminals since 1965, *see*

test.[84] The burden the en banc court thus imposed is an impossible one to discharge, since the opinion refuses to examine the nature of the underlying offenses, *see id.* at 659 (A. 36); pt. Bla(ii), at 29-30 *supra,* and it is inappropriate for Eighth Amendment analysis, since even the most reprehensible torture has some rational basis as retribution or deterrent.[85] Moreover, the "rational basis" standard has no support in this Court's Eighth Amendment decisions, which require at most that the courts give deference to the legislative judgment. *See, e.g., Gregg,* 428 U.S. at 175 (Stewart, Powell & Stevens, JJ., plurality opinion).

Table 1 (C. 1-21), and even if a favorable Eighth Amendment decision in this case applies retroactively, *cf.* Stovall v. Denno, 388 U.S. 293, 297 (1967), only a handful of those can point to three nonviolent property offenses with no potential violence as the basis for their sentence, *see* Table 1 (C. 1-21), listing every reported habitual offender case in the Texas Court of Criminal Appeals since 1965, grouping first all cases involving prisoners with three or more convictions for violent crimes, in descending order approximately according to degree of potential violence, listing last (C. 21) those cases—only 8 of 380 cases (.02105 or 2.1%)—in which the prisoner committed only nonviolent property crimes). There will be no flood, just a trickle. This further highlights the gross injustice that Rummel's sentence represents.

[84] *See* Radin, *supra* note 8, 126 U. Pa. L. Rev. at 1001-09.

[85] *Id.* at 1011.

D. Rummel Has Not Procedurally Defaulted the Right to Challenge His Punishment as Cruel and Unusual by Failing to Object on that Basis at the Punishment Phase of His Trial.

For the *first time* in this habeas proceeding,[86] the State argued in the en banc court[87] and again in this Court[88] that because Rummel failed to object to his sentence during the punishment stage of his trial (*see* R. 118-20, 243-45), the combination of the federal "procedural default doctrine" and the Texas "contemporaneous objection rule" bars Rummel from objecting in a habeas corpus petition that his punishment is unconstitutionally cruel and unusual. This argument must fail because (1) the State waived it by not raising it below and (2) Texas law permits a constitutional objection of this nature to be made at any time.

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[86] The State did not raise this issue in proceedings in either the state courts (*see* R. 40-45), the federal district court (*see* R. 12-21), or the Fifth Circuit panel, *see* Brief of Appellee, Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978); Appellee's Responsive Supplemental Brief, 568 F.2d 1193 (5th Cir. 1978).

[87] Appellee's Second Supplemental Brief at 36-40, Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978) (en banc).

[88] Respondent's Brief in Opposition, Rummel v. Estelle, No. 78-6386, at 8-9, *cert. granted*, 47 U.S.L.W. 3760 (U.S. May 21, 1979).

1. The State Waived Its Right to Argue Procedural Default by Not Raising the Argument in the Lower Court.

Rule 8(c) of the Federal Rules of Civil Procedure, which applies in habeas corpus cases,[89] requires that all affirmative defenses be alleged in responsive trial pleadings: "In pleading to a preceding pleading, a party shall set forth affirmatively . . . waiver, and any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c). The lower courts unanimously agree that failure to plead an affirmative defense waives it[90] and that it cannot be raised for the first time on appeal.[91] Having failed to raise the procedural default issue below, the State cannot raise it now.

2. The Texas Contemporaneous-Objection Rule Does Not Apply to Rummel's Objection to His Sentence.

In support of its position that Rummel waived his right to object to the life sentence by failing to object

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[89] Rule 11, Rules Governing Section 2254 Causes; 17 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure: Jurisdiction* ch. 12, § 4268, at 694 (1978).

[90] *See, e.g.*, Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 96 (5th Cir. 1976); Phoenix Assurance Co. v. Appleton City, 296 F.2d 787, 792 (8th Cir. 1961).

[91] *E.g.*, Atlas Assurance Co. v. Standard Brick & Title Corp., 264 F.2d 440, 443 (7th Cir. 1959).

at trial, the State weakly cites 5 Tex. Jur. 2d, *Appeal and Error—Criminal Cases* § 22, at 42-43 (1959), *cited in* Respondent's Brief in Opposition at 8, *Rummel* v. *Estelle,* No. 78-6386, *cert. granted,* 47 U.S.L.W. 3760 (U.S. May 21, 1979), but fails to cite the next section, *id.* § 23, which provides that failure to raise a fundamental error at trial does not preclude raising it on appeal. According to this authority, among those fundamental errors that can be raised at any time is "an objection that the statute under which the defendant was convicted is violative of the constitution." *Id.* at 44 (citing *Barnes* v. *State,* 170 S.W. 548, 550 (Tex. Crim. App. 1914), *cited approvingly in Gann* v. *Keith,* 253 S.W.2d 413, 417 (Tex. 1952)). On this basis, the en banc court rejected the State's argument. 587 F.2d at 653-54 (A. 27). Moreover, Texas courts do not find waiver when the defendant fails to object on a ground "not yet established as a defect of constitutional magnitude," *Ex Parte Sanders,* ___ S.W.2d ___, No. 60,221, Slip Op. at ___ (Tex. Crim. App., Mar. 14, 1979); *Ex parte Casarez,* 508 S.W.2d 620, 622 (Tex. Crim. App. 1974), recognized as part of the general rule that waiver of fundamental constitutional rights must be clear, *see Sanders,* Slip Op. at ___.[92]

[92] *Cf.* Gilmore v. Utah, 429 U.S. 1012, 1013 (1976) (terminating stay of execution based on "knowing and intelligent waiver of any and all federal rights"); *id.* at 1014-15 (Burger, C.J., & Powell, J., concurring) (same); *id.* at 1018 (White, Brennan & Marshall, JJ., dissenting) (arguing that objection to a punishment on Eighth Amendment grounds cannot be waived); *id.* at 1019 (Marshall, J., dissenting) (same).

That Texas courts have created such an exception is not surprising. The contemporaneous objection rule was devised to prevent an accused from seeking a new trial if unsuccessful in the current one by raising for the first time on appeal correctible trial errors.[93] This rationale explains why *every* case cited by the State in which the rule was applied, *see* cases cited in Respondent's Brief in Opposition at 8, *Rummel* v. *Estelle,* No. 78-6386, *cert. granted,* 47 U.S.L.W. 3760 (U.S. May 21, 1979), concerns objections to evidentiary or other matters that can be corrected by instruction or mistrial. Since such a policy has no application to Rummel's claim, the contemporaneous-objection rule does not apply here.

Even if it did apply, the two grounds justifying an exception to the procedural default doctrine recognized in *Francis* v. *Henderson,* 425 U.S. 536, 542

[93] Mason v. State, 459 S.W.2d 855, 858 (Tex. Crim. App. 1970); *see Ex parte* Bagley, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974). As described by Justice Powell in Estelle v. Williams, 425 U.S. 501 (1976), one of the "situations in which a conviction should be left standing despite the claimed infringement of a constitutional right . . . arises when a defendant has made an 'inexcusable procedural default' in failing to object *at a time when a substantive right could have been protected.*" *Id.* at 513-14 (concurring opinion) (emphasis added); *see* Wainright v. Sykes, 433 U.S. 72, 88-90 (1976) (the contemporaneous-objection rule prevents "sandbagging" by defense lawyers gambling on a not-guilty verdict in state court while preserving their constitutional claims for the federal habeas court).

(1976); *accord, Wainwright* v. *Sykes,* 433 U.S. 72, 90-91 (1976)—"good cause" and "actual prejudice"—would protect Rummel. "Good cause" is present if the defendant can show that no reasonable person would have freely elected not to object.[94] Surely no one can dispute that Rummel had no reasonable expectation of prevailing in state court on his Eighth Amendment claim, given the long line of Texas cases upholding the habitual offender provision from Eighth Amendment attack, as pointed out by the en banc court below, 587 F.2d at 653 & n.2 (A. 27 & n.2), and further confirmed in the summary rejection by the Texas Court of Criminal Appeals (R. 31) of Rummel's appeal from the denial by the lower state court of his application for habeas corpus relief on the same issue (R. 51-54). Moreover, Rummel obviously had no tactical reason for withholding his objection, since (1) he did not raise the issue in his direct appeal, *see* 509 S.W.2d 630, and (2) he would have received no greater relief from a successful appeal than from a successful trial court ruling.

"Actual prejudice" is likewise easily demonstrated, since Rummel is serving a significantly longer sentence than he would have if the trial judge had ruled the sentence excessive.

[94] According to one authority, "a defendant may avoid [procedural default] by showing not only that he did not 'waive' the right by free and intelligent choice but also that no reasonable person would, under the circumstances, have done so." Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis,* 55 Texas L. Rev. 193, 211 (1977).

E. The Prosecutor's Discretion to Indict Habitual Offenders Is Not an Issue in this Case.

The State claims that a ruling that Rummel's sentence is unconstitutionally excessive requires holding that the prosecutor abused his discretion in the charging process, Respondent's Brief in Opposition at 12, *Rummel* v. *Estelle,* No. 78-6386, *cert. granted,* 47 U.S.L.W. 3760 (U.S. May 21, 1979), and that the State should be given the opportunity to demonstrate all factors bearing on the prosecutor's original decision, *id.* at 13. But Rummel challenges the Texas Legislature's right to confer the power to punish a three-time petty property offender under the habitual offender statute, not the prosecutor's decision to exercise that power,[95] as even the en banc court below apparently recognized, *see* 587 F.2d at 660 n.24 (A. 37 n.24). Moreover, the factors upon which the State requests an opportunity to justify the prosecutor's exercise of discretion are matters that were *not* a part of the

[95] In upholding as constitutional a prosecutor's threat to invoke a state recidivist law in his attempt to obtain a guilty plea, the Court in *Bordenkircher* based its decision on the need for broad prosecutional discretion in plea bargaining. *See* 434 U.S. at 361-65. This case poses no threat to the exercise of that discretion. Rummel seeks merely to remove one weapon from the prosecutor's arsenal in a limited number of cases; prosecutorial discretion to threaten use of available punishments would be unaffected.

original record but were first raised in an eleventh-hour *amicus curiae* brief filed shortly before oral argument in the Fifth Circuit en banc. The State's attempt to shift the issue from legislative power to prosecutorial discretion and to rely on matters outside the record exposes the weakness of the State's position.

F. If the Court Agrees that Rummel's Life Sentence Is Unconstitutionally Excessive, Rummel Is Entitled to Immediate Release.

Under Texas law, if an appellate court determines that reversible error occurred in the punishment phase of a trial, then the proper remedy depends on whether the penalty was assessed by judge or jury. If determined by a judge, the case must be remanded to the trial court for proper resentencing. *Bullard* v. *State*, 548 S.W.2d 13, 18 & cases cited therein (Tex. Crim. App. 1977). If assessed by the jury, the appellate court cannot order a new trial on the punishment issue alone or a new punishment hearing before a different jury, *id.*, but must remand for a new trial.[96]

[96] *E.g., Ex parte* Ropollo, 558 S.W.2d 869, 871 (Tex. Crim. App. 1977); Ellison v. State, 432 S.W.2d 955, 957 (Tex. Crim. App. 1968) (since Texas statutes give a criminal defendant who requests sentencing by a jury the right to be sentenced by the same jury that convicted him, a defendant whose sentence is invalidated on appeal cannot be resentenced but must be granted a new trial).

In this case, Rummel requested that his punishment be assessed by the jury (*see* R. 119, 226, 241-43) pursuant to 1967 Tex. Gen. Laws, ch. 659, § 22, art. 37.07, § 2(b)(3), at 1739; *compare* Tex. Code Crim. Proc. Ann. art. 37.07, § 2(b)(3) (Vernon Supp. 1978), which provides that a judge assesses punishment after a guilty verdict, unless the defendant requests that the sentence be assessed by the jury. With the punishment fixed by law under article 63, the jury merely verified the existence of the two prior convictions (*see* R. 115-17, 119, 239-41).

Thus, a ruling for Rummel on the Eighth Amendment issue would require a new trial. And by the terms of the 1974 Texas Penal Code, 1973 Tex. Gen. Laws, C. 399, § 6(c), at 996, Tex. Penal Code Ann., Savings Provisions, § 6(c) (Vernon 1974), if again found guilty Rummel could elect to have his punishment assessed under that Penal Code and thus face a maximum one-year sentence, *see* note 38 *supra*, which he has long since served, thus entitling him to immediate release.[97]

[97] *Compare, e.g., Ex parte* Swinney, 499 S.W.2d 101, 104 (Tex. Crim. App. 1973) (if maximum possible sentence upon retrial is less than time already served, prisoner is entitled to immediate release).

CONCLUSION

The judgment of the en banc court of appeals should be reversed and Rummel released from confinement.

Respectfully submitted,

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